# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 250 46.

THOMAS CONNOLLY AND WILLIAM E. DEE, PLAINTIFFS IN ERROR,

*vs.*

UNION SEWER PIPE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED APRIL 23, 1900.

(17,729.)

# (17,729.)

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 & 2 United States Circuit Court, Northern District of Illinois, Northern Division.

UNION SEWER PIPE COMPANY
*vs.*
THOMAS CONNELLY. } 24361.

and

UNION SEWER PIPE COMPANY
*vs.*
WILLIAM E. DEE. } 24362.

Edwin Walker, Herbert W. Hamlin, attorney- for Union Sewer Pipe Company.
O'Donnell and Coghlan, attorneys for Thomas Connelly.
John R. McFee and Thomas B. Lantry, attorneys for William E. Dee.

3 Pleas in the circuit court of the United States for the northern district of Illinois, northern division, begun and held, at the United States court room, in the city of Chicago, in said district and division, before the Hon. Christian C. Kohlsaat, district judge of the United States for the northern district of Illinois, on Monday, the twenty-ninth day of January, in the year of our Lord one thousand nine hundred, being one of the days of the regular December term of said court, 1899, and of our Independence the one hundred and twenty-fourth year.

S. W. BURNHAM, *Clerk.*

UNION SEWER PIPE COMPANY
*vs.*
THOMAS CONNELLY. } 24361.

Be it remembered that on this day, to wit, the eighth day of January, in the year of our Lord one thousand eight hundred and ninety-seven, came the plaintiff in said entitled cause, by its attorney, and filed in the clerk's office of said court a certain præcipe in words and figures following, to wit:

4 *Præcipe.*

UNITED STATES OF AMERICA,
*Northern District of Illinois, Northern Division,* } *ss:*

Circuit Court, March Term, A. D. 1897.

UNION SEWER PIPE COMPANY
*vs.*
THOMAS CONNELLY. } 24361. Damages, $3,500.00.

The clerk of said court will issue a summons in said cause to said defendant in a plea of assumpsit, to the damage of said plaintiff in

the sum of three thousand five hundred (3,500) dollars, direct the same to the United States marshal for said district to execute, and make it returnable to the March term of said court, 1897.

Dated this eighth day of January, A. D. 1897.

HERBERT W. HAMLIN,
*Plaintiff's Attorney.*

To S. W. Burnham, Esq., clerk.

(Endorsed:) Filed Jan. 8, 1897. S. W. Burnham, clerk.

On the same day, to wit, the eighth day of January, 1897, a summons issued out of the clerk's office, directed against the defendant in said entitled cause; which said summons, together with the marshal's return thereon endorsed, is in the words and figures following, to wit:

5 *Summons.*

Circuit Court of the United States of America, Northern District of Illinois, Northern Division.

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon Thomas Connelly, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March next, to answer into Union Sewer Pipe Company, a corporation, of a plea of trespass on the case upon promises, to its damage, as is alleged, of thirty-five hundred dollars: and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, at Chicago aforesaid, this 8th [SEAL.] day of January, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence the 121st year.

S. W. BURNHAM, *Clerk.*

*Marshal's Return.*

I have served the within writ by reading the same to and within the presence and hearing of Thomas Connelly, therein named, on the 8th day of Jan., 1897.

J. W. ARNOLD,
*U. S. Marshal,*
By H. R. CLERK, *Deputy.*

(Endorsed:) Filed Jan. 8, 1897. S. W. Burnham, clerk.

6 Afterwards, to wit, on the eighteenth day of February, 1897, came the plaintiff in said entitled cause, by its attorney, and filed in the clerk's office of said court a certain declaration in words and figures following, to wit:

*Declaration on Two Notes—Payee vs. Maker.*

In the Circuit Court of the United States, Northern District of Illinois, Northern Division, March Term, A. D. 1897.

STATE OF ILLINOIS, } ss.:
*Cook County,* }

The Union Sewer Pipe Company, a corporation organized under the laws of Ohio, which is a citizen of the State of Ohio, plaintiff in this suit, by Herbert W. Hamlin, its attorney, complains of Thomas Connelly, who is a citizen of the State of Illinois, defendant in this suit, summoned, etc., of a plea of trespass on the case on promises:

For that whereas the said defendant heretofore, to wit, on the fifteenth day of December, in the year of our Lord one thousand eight hundred and ninety-four, at Chicago, to wit, at the district and in the county aforesaid, year last aforesaid, and then and there, delivered the said note to the said plaintiff, in and by which said note the said defendant, by the name, style, and description of Thomas Connelly, promised to pay to the order of said plaintiff, by the name, style, and description of the Union Sewer Pipe Company, the sum of one thousand eight hundred and fifty dollars and thirty-six cents ($1,850.36) ninety (90) days after date, for value received; by reason whereof and by force of the statute in such case made and provided the said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified according to the tenor and effect of the said note; and, being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the same day and
7 year last aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified according to the tenor and effect of said note.

And also for that whereas the said defendant afterwards, to wit, on the fifteenth day of January, in the year of our Lord one thousand eight hundred and ninety-five, at Chicago, to wit, at the district and in the county aforesaid, made his other certain note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to the said plaintiff, The Union Sewer Pipe Company, in and by which said note the said defendant, by the name, style, and description of Thomas Connelly, promised to pay to the order of the said plaintiff, by the name, style, and description of The Union Sewer Pipe Company, the sum of one thousand two hundred and eighty-nine dollars and fifty-six cents ($1,289.56) ninety (90) days after date, for value received; by reason whereof and by force of the statute in such case made and provided the said defendant became liable to pay to said plaintiff the said sum of money specified in the said note last mentioned according to the tenor and effect of the said note; and, being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid and at the

place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified according to the tenor and effect of said note last mentioned.

And whereas also the said defendant afterwards, to wit, on the twentieth day of April, in the year of our Lord one thousand eight hundred and ninety-five, in said county, became and was in-
8 debted to the said plaintiff in the further sum of thirty-five hundred dollars of lawful money of the United States of America for money before that time lent and advanced by the said plaintiff to the said defendant and at the special instance and request of the said defendant; and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the like special instance and request of the said defendant; and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff; and in the like sum for goods, wares, and merchandise before that time sold and delivered by the said plaintiff to the said defendant at the like special instance and request of the said defendant; and in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the said defendant; and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on day and year aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the
9 said defendant to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of thirty-five hundred dollars of like lawful money, as aforesaid; and, being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested;

Nevertheless the said defendant (although often requested, etc., to wit, on the days when the said notes became due and payable, according to the tenor and effect thereof, and oftentimes since, to wit, at the place last aforesaid) has not yet paid the said several

sums of money above mentioned, or any or either of them or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto wholly neglected and refused and still does neglect and refuse, to the damage of the said plaintiff of thirty-five hundred dollars; and therefore the said plaintiff brings suit, etc.

HERBERT W. HAMLIN,
*Plaintiff's Attorney.*

*Copy of Instruments and Account Sued On.*

$1,850.36. CHICAGO, *Dec. 15th*, 1894.

Ninety days after date I promise to pay to the order of Union Sewer Pipe Co. eighteen hundred fifty and $\frac{36}{100}$ dollars at First nat'l bank, Chicago, Ill., value received.

No. —. Due ——.

(Signed) THOMAS CONNELLY.

(Endorsed:) June 26, p'd $148.00.

10 $1,289.56. CHICAGO, *Jan'y 15th*, 1895.

Ninety days after date I promise to pay to the order of Union Sewer Pipe Co. twelve hundred eighty-nine and $\frac{56}{100}$ dollars at First nat'l bank, Chicago, value received.

No. —. Due ——.

(Signed) THOMAS CONNELLY.

Thomas Connelly to Union Sewer Pipe Company, Dr.

| | |
|---|---|
| To goods, wares, and merchandise sold and delivered..... | $3,500.00 |
| To money lent and advanced..... | 3,500.00 |
| To money paid, laid out, and expended..... | 3,500.00 |
| To money had and received to and for the use of said plaintiff ..... | 3,500.00 |
| To money due for interest and forbearance..... | 3,500.00 |
| To labor, services, and material..... | 3,500.00 |
| To balance due on account stated ..... | 3,500.00 |

*Plaintiff's Affidavit of Amount Due.*

Circuit Court of the United States, Northern District of Illinois, Northern Division, March Term, A. D. 1897.

UNION SEWER PIPE COMPANY )
*vs.*
THOMAS CONNELLY. )

STATE OF ILLINOIS, )
*County of Cook*, ) ss:

Herbert W. Hamlin, being duly sworn, says that the demand of the plaintiff in the above-entitled cause is for the full amount of the

two notes copies of which are attached to the foregoing declaration, according to the tenor and effect of said notes, and that there is due to the plaintiff from the defendant, after allowing to him all just credits, deductions, and set-offs, three thousand two hundred and fifty-eight dollars and sixty cents ($3,258.60) to date.

HERBERT W. HAMLIN.

11 Subscribed and sworn to before me this eighth day of January, 1897.

[SEAL.] MAUDE B. JONES,
*Notary Public.*

(Endorsed:) Filed Feb. 18, 1897. S. W. Burnham, clerk.

Afterwards, to wit, on the second day of March, 1897, came the defendant in said entitled cause, by its attorney, and filed in the clerk's office of said court a certain appearance and plea in words and figures following, to wit:

12 *Appearance and Plea of Defendant.*

STATE OF ILLINOIS, } *ss.*
*County of Cook,* }

In the Circuit Court of the United States for the Northern District of Illinois.

UNION SEWER PIPE COMPANY OF AKRON, OHIO, }
*vs.* } No. 24361.
THOMAS CONNELLY. }

And now comes the said defendant, by O'Donnell & Coghlan, his attorneys, and enters his appearance herein, and the said O'Donnell & Coghlan enter their appearance as attorneys for the said defendant in the above-entitled cause.

O'DONNELL & COGHLAN,
*Attorneys for Defendant.*

And the said defendant, Thomas Connelly, by O'Donnell & Coghlan, his attorneys, comes and defends the wrong and injury, when, etc., and says that he did not undertake or promise in manner and form as the said plaintiff has above thereof complained against him; and of this he puts himself upon the country, etc.

O'DONNELL & COGHLAN,
*Defendant's Attorneys.*

STATE OF ILLINOIS, }
*County of Cook,* } ss:

In the Circuit Court of the United States for the Northern District of Illinois.

UNION SEWER PIPE CO. }
*vs.*
THOMAS CONNELLY. }

John W. McClory, being duly sworn, on oath says that he is agent for the defendant in the above-entitled cause, and that
13 he verily believes the said defendant has a good defense to said suit upon the merits to the whole of said plaintiff's demand.

JOHN W. McCLORY.

Subscribed and sworn to before me this 1st day of March, 1897.
[SEAL.] HENRY D. COGHLAN,
*Notary Public.*

And for a further plea in this behalf the defendant says that the plaintiff ought not to have its aforesaid action against him, the defendant, because he says that the plaintiff is organized and doing business in this State contrary to the provisions of section one of an act of the statute of 1893 for the State of Illinois, entitled "An act to define trusts and conspiracies against trade," etc.; that plaintiff, at the time of giving the promissory notes mentioned in plaintiff's declaration and long prior and subsequent thereto, had combined with certain other corporations of the State of Ohio and elsewhere and association of persons to create and carry out restrictions in trade; to limit or reduce the production or increase or reduce the price of merchandise or commodities; to prevent competition in manufacturing, making, transporting, selling, or purchasing of merchandise, produce, or commodity; to fix a standard or figure whereby the price of commodities to the public shall be controlled or established, which product or manufacture are intended for sale, use, or consumption, and were sold, used, and consumed in the State of Illinois; to establish pretended agencies whereby the sale of produce or commodities shall be covered up and made to appear to be for the original vendor for a like purpose or purposes, and to enable the original vendor to manufacture and to control the wholesale and retail price of such articles, commodities, or product after the title to same shall have passed from such vendor or manufacturer; to make and enter into
14 and examine and carry out certain contracts, obligations, and agreements by which they shall bind and the plaintiff has bound itself not to sell, dispose of, or transport any article or commodity of trade, for use in commerce or consumption, below a common standard figure or card or list price, or by which they and it agree to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they and it settle the price of any article or commodity or transportation between it and

them, so as to preclude a free and unrestricted competition among themselves or others in the sale or transportation of such articles or commodity, or by which it and they have agreed to pool, combine, and unite whatever interest it and they have in connection with the sale or transportation of such articles or commodities, whereby its price is in such manner affected; and the defendant avers that the articles claimed to have been sold by it to this defendant, for which the promissory notes mentioned in plaintiff's declaration were given in settlement of, were all sold while the plaintiff was organized and doing business in the State of Illinois, in violation of the act of the legislature of the State of Illinois hereinbefore referred to; and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action against him.

O'DONNELL & COGHLAN,
*Attorneys for Defendant.*

STATE OF ILLINOIS, }
*County of Cook,* } ss:

John W. McClory, being duly sworn, on oath deposes and says that he is agent for Thomas Connelly, the defendant herein; that he has read the above plea and knows its contents, and that the same is true.

JOHN W. McCLORY.

15 Subscribed and sworn to before me this 1st day of March, 1897.

[SEAL.] HENRY D. COGHLAN,
*Notary Public.*

(Endorsed:) Filed March 2, 1897. S. W. Burnham, clerk.

Afterwards, to wit, on the tenth day of March, 1898, came the plaintiff in said entitled cause, by its attorney, and filed in the clerk's office of said court a certain demurrer in words and figures following, to wit:

16 *Demurrer.*

UNITED STATES OF AMERICA, }
*Northern District of Illinois, Northern Division,* } ss:

In the Circuit Court of the United States, Northern District of Illinois, Northern Division, March Term, A. D. 1897.

UNION SEWER PIPE COMPANY }
*vs.* } 24361.
THOMAS CONNELLY. }

And the said plaintiff, as to the said plea of the said defendant by him secondly above pleaded, says that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are insufficient in law to bar or preclude it, the said plaintiff, from having or maintaining its aforesaid action thereof

against the said defendant, and that it, the said plaintiff, is not bound by law to answer the same; and this it, the said plaintiff, is ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment and its damages by reason of the not performing of the said several promises and undertakings in the said decree *in the said decree* mentioned to be adjudged to it, etc.

HERBERT HAMLIN,
*Plaintiff's Attorney.*

(Endorsed:) Filed March 10, 1898. S. W. Burnham, clerk.

Afterwards, to wit, on the twentieth day of April, 1898, in the December term of said court, 1897, in the record of proceedings thereof in said entitled cause, before the Hon. John W. Showalter, district judge, appears the following entry, to wit:

17 Circuit Court of the United States, Northern District of Illinois, Northern Division.

WEDNESDAY, *April* 20, 1898.

Present: Hon. John W. Showalter, circuit judge.

UNION SEWER PIPE COMPANY
*vs.*
THOMAS CONNELLY. } 24361. Assumpsit.

Now come the parties, by their attorneys, and the defendant has leave to withdraw the special pleas herein and file instanter, under the general issue, notice of special defenses and set-off.

On the same day, to wit, the twentieth day of April, 1898, came the defendant, by its attorneys, and filed in the clerk's office of said court its notice of special defenses in words and figures following, to wit:

18 STATE OF ILLINOIS, } ss:
*County of Cook.* }

In the Circuit Court of the United States in and for the Northern District of Illinois.

THE UNION SEWER PIPE COMPANY
*vs.*
THOMAS CONNELLY. } Gen'l No., 24361.

*Notice of Special Defenses.*

Take notice that upon the trial of this action the defendant will, in defense thereto, rely on the special matters hereinafter stated—that is say:

Firstly. That the plaintiff is and at all times since about the first day of January, A. D. 1893, has been a trust or combination of the capital, skill, and acts of divers persons and corporations carrying

on a commercial business in the States of Ohio and Illinois and between said States and elsewhere in the United States of America, and organized for the express purpose of unlawfully and contrary to the common law creating and carrying out restrictions in trade, to wit, in the trade of buying, selling, and otherwise dealing in certain articles of merchandise, to wit, sewer and drainage pipes, and also for the express purpose of unlawfully and contrary to the common law limiting the production of said articles of merchandise and increasing the market price thereof, and also for the express purpose of unlawfully and contrary to the common law preventing competition in the manufacture, making, transportation, sale, or purchase of said articles of commerce; also for the express purpose of unlawfully and contrary to the common law fixing standards or figures whereby the prices of said articles of merchandise intended for sale, use, and consumption in this State should be controlled and established, and also for the express
19 purpose of unlawfully and contrary to the common law being a pretended agency whereby the sale of said articles of commerce should and might be covered up and made to appear to be for the original vendors thereof, and so as to enable the original vendors or manufacturers thereof to control the wholesale and retail price of such articles of commerce after the title thereto had passed from such vendors or manufacturers, and for the express purpose of unlawfully and contrary to the common law making and entering into and carrying out a certain contract or certain contracts by which the several persons or corporations forming the plaintiff, or being the pretended stockholders thereof, to wit, have bound themselves not to sell, dispose of, or transport said articles of commerce below certain common standards figures or card or list prices in excess of the true market values thereof, and by which they have agreed to keep the prices of said articles of commerce at certain fixed or graduated figures, and by which they have established certain settled prices of said articles of commerce between themselves and others, so as to preclude a free and unrestricted competition among themselves and others in the sale and transportation of said articles of commerce, and by which they have agreed to pool, combine, and unite any interests they may have in connection with the sale and transportation of said articles of commerce so that the prices thereof may effect advantageously to themselves; that all of the claims of the plaintiff against the defendant in this action arise wholly out of and are in respect of sales of said articles of merchandise made between the 1st day of January, A. D. 1893, and the 1st day of March, 1896, to this defendant by the plaintiff in the ordinary course of its business as such a trust or combination acting as aforesaid, and that this action is brought to recover the alleged price thereof and for no other purpose.

20 Secondly. That the plaintiff is and at all times since the 1st day of January, 1893, was a combination in the form of a trust, in restrain- of trade and commerce among the several States, and doing business as such throughout the United States and between the States of Ohio and Illinois, contrary to the provisions of

an act of Congress of date July 2, 1890, and entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes, sold to the defendant by the plaintiff, then and there acting and doing business as such a combination, as aforesaid, in violation of the provisions of said act.

Thirdly. That the plaintiff is and at all times since the 1st of January, 1893, was a trust and doing business as such in the State of Illinois and elsewhere, contrary to the provisions of an act of the legislature of the State of Illinois entitled "An act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void, and making certain acts and violations thereof misdemeanors, and prescribing punishment thereof and matters connected therewith, approved June 20th, 1893, in force July 1st, 1893"; that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes, sold to the defendant by the plaintiff, then and there acting and doing business in violation of the provisions of said act, and that the defendant hereby pleads said act in defense to this action and the whole thereof, the same as if he specially pleaded thereto.

O'DONNELL & COG-LAN,
*Attorneys for Defendant.*

21 *Notice of Set-off.*

Take further notice that on the trial of this cause the defendant will give in evidence and insist that the plaintiff was before and at the time of the commencement of this suit and still is indebted to the defendant in the sum of forty thousand dollars, for that the plaintiff is and ever since the first day of January, 1893, was a combination in the form of a trust, in restraint of trade and commerce between the States of Illinois and Ohio and between other States within the United States, and that by reason of the plaintiff being such a combination, and as the direct, inevitable, and proximate result thereof, the defendant has been injured in his business, and by reason of acts and things done by the plaintiff and forbidden and declared to be unlawful by an act of Congress of date June 2nd, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," to wit, the selling at divers times between the first day of January, 1893, and the 1st day of March, 1896, divers goods and merchandise, to wit, sewer and drainage pipes, to the defendant while residing and carrying on business in the State of Illinois by the plaintiff while residing and carrying on business in the State of Ohio, which goods and merchandise the defendant was by force of circumstances beyond the reasonable control of the defendant, and wrongfully, designedly, and intentionly brought about solely by the plaintiff, compelled to obtain from the purchase of the plaintiff at prices largely in excess of the true and real market price thereof—that is to say, the defendant was between the 1st day of January, 1893, and the

first day of March, 1896, compelled to pay and did pay to the plaintiff for quantities of sewer and drainage pipes shipped between said dates by the plaintiff from the State of Ohio to
22 the defendant and into the State of Illinois one hundred thousand dollars or thereabouts, being forty thousand dollars over and in excess of the true and real market value thereof, whereby the defendant lost and was actually damaged in his business of a sewer contractor in the sum of forty thousand dollars; wherefore the defendant now claims, under and by virtue of the provisions of said act of Congress, by way of set-off against the plaintiff in this action, one hundred and twenty thousand dollars, being three times the actual amount of his actual loss and damage, together with reasonable attorney's fee, to wit, $5,000.00, and his costs of suit.

And take further notice that the defendant will give in evidence and insist that the plaintiff was at the time of the commencement of this suit and still is indebted to the defendant in the sum of forty thousand dollars, damages sustained by the defendant by reason of the plaintiff becoming and since the first day of January, 1893, continuing to be and trade as a trust or combination of persons and corporations doing business in the States of Ohio and Illinois and between said States, organized for the express purpose of unlawfully — and contrary to the provisions of an act of the legislature of the State of Illinois entitled "An act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void and making certain acts and violations thereof misdemeanors and proscribing punishment thereof and matters connected therewith, approved June 20th, 1893, in force July 1st, 1893," and that by reason of the plaintiff being and doing business as such a trust or combination, as aforesaid, the defendant was, by force of circumstances beyond his reasonable control and which existed
23 and were wrongfully, designedly, and intentionally brought about by the plaintiff, compelled to obtain from and did obtain from the plaintiff, between the 1st day of January, 1893, and the 1st day of March, 1896, large quantities of certain merchandise, to wit, sewer and drainage pipes, and was compelled to pay out and did pay therefor the sum of one hundred thousand dollars, which amount was largely in excess of the true and real market value thereof, to wit, the sum of forty thousand dollars.

And take further notice that the defendant will give in evidence and insist that the plaintiff was and before and at the time of the commencement of this suit and still is indebted to the defendant in the sum of forty thousand dollars, money had and received by the plaintiff to the use of the defendant, in that the plaintiff became, on or about the first day of January, 1893, and has ever since continued to be and operate as a trust or combination of persons and corporations, doing business in the State of Ohio and between said State and the State of Illinois, and organized and existing for the express and sole purpose of unlawfully controlling and regulating, in restrain- of trade and contrary to the common law, the market price of certain articles of commerce, to wit, sewer and drainage pipes; that the defendant was compelled, wholly by reason of the pressure of

circumstances beyond his reasonable control, and wrongfully, designedly, and intentionally brought about by the plaintiff, to purchase and did purchase from the plaintiff, acting and doing business as such a trust or combination, large quantities of said articles of commerce, of the true market value of sixty thousand dollars or thereabouts, at the unreasonable, inflated, and compulsory price of over one hundred thousand dollars.

And on the trial of this action the defendant will set off
24 and allow to the plaintiff against any true and lawful demand on its part to be proved on such trial so much of the said sums of money so due from the plaintiff to the defendant, as aforesaid, as will be sufficient to satisfy and discharge such demand.

O'DONNELL & COGHLAN,
*Attorneys for Defendant.*

(Endorsed:) Filed Apr. 20, 1898. S. W. Burnham, clerk.

Afterwards, to wit, on the fourteenth day of May, 1898, in the December term of said court, 1897, in the record of proceedings thereof in said entitled cause before the Hon. William J. Allen, district judge, appears the following entry, to wit:

25 Circuit Court of the United States, Northern District of Illinois, Northern Division.

SATURDAY, *May* 14, 1898.

Present: Hon. William J. Allen, district judge.

UNION SEWER PIPE COMPANY
*vs.* } 24361.
THOMAS CONNELLY.

Now come the parties, by their attorneys, and, on motion of the plaintiff, it is ordered that the defendant be, and hereby is, ruled to file bill of particulars in support of plea of set-off in ten days.

Afterwards, to wit, on the twenty-third day of May, 1898, in the December term of said court, 1897, in the record of proceedings thereof in said entitled cause, before the Hon. William J. Allen, district judge, appears the following entry, to wit:

26 Circuit Court of the United States, Northern District of Illinois, Northern Division.

MONDAY, *May* 23, 1898.

Present: Hon. William J. Allen, district judge.

UNION SEWER PIPE COMPANY
*vs.* } 24361. Assumpsit.
THOMAS CONNELLY.

Now come the parties, by their attorneys, and the time to file bill of particulars is hereby extended twenty days.

Afterwards, to wit, on the fifteenth day of September, 1898, in the July term of said court, in the record of proceedings thereof in said entitled cau-e, before the Hon. John W. Showalter, circuit judge, appears the following entry, to wit:

27 Circuit Court of the United States, Northern District of Illinois, Northern Division.

TUESDAY, *September* 15, 1898.

Present: Hon. John W. Showalter, circuit judge.

THE UNION SEWER PIPE CO. *vs.* THOMAS CONNELLY. } 24361. Assumpsit.

Now, on this day, come the parties, by their attorneys, and the plaintiff has leave to increase the *ad damnum* herein to the sum of four thousand dollars, and, on motion of the plaintiff, the defendant is ruled to file his bill of particulars in fifteen days.

28 And on the 27th day of September, 1898, came the defendant and filed in the clerk's office of said court his bill of particulars in words and figures following, to wit:

UNITED STATES OF AMERICA, *Northern District of Illinois, Northern Grand Division* } *ss.*:

In the Circuit Court Thereof.

THE UNION SEWER PIPE COMPANY *vs.* THOMAS CONNELLY. } Gen'l No., 24361.

Now comes the defendant and files this his bill of particulars, pursuant to the rule heretofore entered in the above-entitled cause.

*First Set-off.*

Treble the amount of the actual damages sustained, allowed by act of Congress of date June 2nd, 1890, to wit:

| | |
|---|---|
| Overcharge of 5% on 255 cars of ring pipe and fittings paid for by defendant between February 24th, 1893, and June 30th, 1896, at the average price of about $550.00 per car, $139,841.46—$6,992.07 ..... | $20,976.21 |
| Overcharge of 2½% on 688 cars of socket pipe paid for by defendant between February 24th, 1893, and June 30th, 1896, at the average rate of about $600.00 per car, $10,331.41 ..... | 30,994.23 |
| Amount paid, $413,256.76. | |
| Reasonable attorneys' fees allowed by said act ..... | 5,000.00 |
| | $56,970.44 |

*Second Set-off.*

Actual damages sustained by the defendant by reason of plaintiff's violation of an act of the legislature of the State of Illinois entitled "An act to define trusts and conspiracies, etc., in force July 1st, 1893," as above set forth, of 5% more than market value, of about 255 cars of ring pipe and fittings, at an average price of about $550.00 per car, for which defendant paid the plaintiff $139,841.46, and of 2½% more than market value of 688 cars of socket pipe, at an average price of $600.00 per car, on which the defendant paid to the plaintiff the sum of $413,256.76:

| | |
|---|---|
| Damages on ring pipe and fittings | $6,992.07 |
| Damages on socket pipe | 10,331.41 |
| | $17,323.48 |

29 *Third Set-off.*

To money had and received by plaintiff of defendant contrary to law, viz:

| | |
|---|---|
| 5 % of $139,841.46 | 6,992.07 |
| 2½ % of $413,256.76 | 10,331.41 |
| | $17,323.48 |

Respectfully submitted.

O'DONNELL & COGHLAN,
RICHARD PRENDERGAST,
J. E. DEAKIN,
*Attorneys for Defendant.*

(Endorsed:) Filed Sept. 27, 1898. S. W. Burnham, clerk.

30 Afterwards, to wit, on the 16th day of January, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

Circuit Court of the United States, Northern District of Illinois, Northern Division.

TUESDAY, *January* 16, 1900.

Present: Hon. Christian C. Kohlsaat, district judge.

UNION SEWER PIPE CO. *vs.* THOMAS CONNELLY. } 24361.

Now come the parties, by their attorneys, and the defendant has leave to file an amendment to his notice of set-off under the plea of general issue herein.

And on the same day, to wit, the sixteenth day of January, 1900,

came the defendant, by his attorneys, and filed in the clerk's office of said court a certain amendment of notice of set-off in words and figures following, to wit:

31 UNITED STATES OF AMERICA, } ss:
*Northern District of Illinois,* }

*In the Circuit Court of the United States in and for the Northern District of Illinois.*

THE UNION SEWER PIPE COMPANY }
*vs.* } Gen. No., 24361.
THOMAS CONNOLLEY. }

*Amendment of Notice of Set-off. Filed by Leave of Court First Had and Obtained.*

1st. Insert after the word "demand," the last word in said notice of set-off, the following, viz:

And you will further take notice that at the trial of said cause the defendant will give in evidence and insist that all and singular the matters and defenses hereinbefore specially given notice of arose out of sales of goods, wares, and merchandise made by the plaintiff to the defendant, the prices of which are sought to be recovered in this action, and that such sales were made in furtherance of and connected with the unlawful combination in the nature of a trust, as aforesaid, and that the prices charged for the said goods, wares, and merchandise so sold and the prices of other goods, wares, and merchandise sold and delivered by the plaintiff to the defendant and paid for by him were unreasonable and produced by the unlawful combination in the nature of a trust aforesaid, and that this defendant does offset the amount of such unreasonable prices so produced in excess of the actual value and reasonable prices at the time of such sales as damages to the plaintiff's demand in this action and will ask judgment against the plaintiff for such excess; and

32 You will take further notice that the defendant will do all this in connection with all and singular the other matters of set-off of which you have heretofore been given notice.

O'DONNELL AND COGHLAN,
*Attorneys for Defendant.*

(Endorsed:) Filed Jan. 16, 1900. S. W. Burnham, clerk.

Afterwards, to wit, on the twenty-second day of January, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

33 Circuit Court of the United States, Northern District of Illinois, Northern Division.

MONDAY, *January* 22, 1900.

Present: Hon. Christian C. Kohlsaat, district judge.

UNION SEWER PIPE COMPANY
*vs.* } 24361.
THOMAS CONNELLY.

Now come the parties, by their attorneys, and, this cause being called for trial, a jury is called and partly examined, when the hour for adjournment arrived. The further trial of this cause is postponed until tomorrow morning.

On the same day, to wit, the twenty-second day of January, 1900, there was filed in the clerk's office of said court the following motion in words and figures following, to wit:

34 United States Circuit Court, Northern District of Illinois.

THE UNION SEWER PIPE COMPANY
*vs.*
THOMAS CONNELLY.

Comes now the plaintiff, by its attorneys, and moves the court to strike from the files the notices of special defense and set-off hereinbefore filed by the defendant in the above-entitled cause, for the reason that said notices and each of them are wholly insufficient and inconsistent.

HERBERT W. HAMLIN,
*Att'y for Plaintiff.*

EDWIN WALKER, *Of Counsel.*

(Endorsed:) Filed Jan. 22, 1900. S. W. Burnham, clerk.

Afterwards, to wit, on the twenty-third day of January, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

35 Circuit Court of the United States, Northern District of Illinois, Northern Division.

TUESDAY, *January* 23, 1900.

Present: Hon. Christian C. Kohlsaat, district judge.

UNION SEWER PIPE COMPANY
*vs.* } 24261.
THOMAS CONNELLY.

Now come the parties, by their attorneys, and the plaintiff enters its motion to strike from the files the notices of special matters of

defense proposed to be introduced under the plea of general issue, and the arguments on said motion being heard in part when the hour for adjournment arrived, the further hearing is postponed until tomorrow morning.

Afterwards, to wit, on the twenty-fourth day of January, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

36 Circuit Court of the United States, Northern District of Illinois, Northern Division.

WEDNESDAY, *January* 24, 1900.

Present: Hon. Christian C. Kohlsaat, district judge.

UNION SEWER PIPE COMPANY
*vs.* } 24361.
THOMAS CONNELLY.

Now come the parties, by their attorneys, and the court, having heard the arguments of counsel upon said motion to strike out special matters of defense set up in notice and being fully advised in the premises, denies the same; to which ruling the plaintiff excepts, and the motion of plaintiff to strike out plea of set-off allowed; to which the defendant, by his attorney, objects and excepts; and thereupon come the following jury, to wit, L. M. Olmstead, Alex. C. Mann, Burr B. Smiley, N. E. Trumble, S. S. Guthrie, Andrew J. Reed, C. A. Vosburgh, Dewitt C. Hull, James Watrous, Ed. S. Austin, Walter Walrod, and R. C. Lanning, who were all duly elected, tried, and sworn to well and truly try said issue and a true verdict give according to the law and evidence; and the evidence for plaintiff being now heard, the defendant enters his motion for leave to file an amended plea of set-off; to which the plaintiff objects and excepts; and the court, having heard the arguments of counsel upon said motion, sustains the same, and leave to file such amended plea of set-off is sustained; to which the plaintiff, by its attorney, excepts; and thereupon, — the consent of counsel, it is ordered that this cause be tried with cause, general number 24362, the same plaintiff against William E. Dee; and the hour for adjournment having ar-
37 rive- *arrived*, the further trial of this cause is postponed until tomorrow morning.

Afterwards, to wit, on the twenty-fifth day of January, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

38 Circuit Court of the United States, Northern District of Illinois, Northern Division.

THURSDAY, *January* 25, 1900.

Present: Hon. Christian C. Kohlsaat, district judge.

UNION SEWER PIPE COMPANY
*vs.* } 24361.
THOMAS CONNELLY.

Now again come the parties, by their attorneys, and come also said jury, and, the further evidence being heard, when the hour for adjournment arrived the further trial is postponed until tomorrow morning.

Afterwards, to wit, on the twenty-sixth day of January, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

39 Circuit Court of the United States, Northern District of Illinois, Northern Division.

FRIDAY, *January* 26, 1900.

UNION SEWER PIPE COMPANY
*vs.* } 24361.
THOMAS CONNELLY.

Now again come the parties, by their attorneys, and come also said jury, and thereupon the trial of this cause is resumed, and, further evidence being heard on behalf of defendant, leave is given the defendant to amend his notice of special defenses under the plea of general issue by interlining after the words "common law" the following: "then and there in force in the State of Illinois and the common law then and there — force in the State of Ohio;" and thereupon the evidence for the plaintiff in rebuttal is heard to conclusion and this cause is postponed until Saturday morning.

On the same day, to wit, the twenty-sixth day of January, 1900, came the defendant in said entitled cause, by his attorney, and, by leave of court first had and obtained, filed in the clerk's office of said court an amendment to notice of special defenses in words and figures following, to wit:

40 UNITED STATES OF AMERICA, } ss:
*Northern District of Illinois,* }

In the United States District Court of Illinois.

UNION SEWER PIPE COMPANY }
*vs.* } Gen. No., 24361.
THOMAS CONNELLY. }

*Amendment to Notice of Special Defenses Filed After Leave of Court First Had and Obtained.*

First. After the words "common law," in the 7th line of the 1 paragraph of the 1 page of said notice filed, insert the following: "then and there in force in the State of Illinois and the common law then and there in force in the State of Ohio."

Second. After the words "common law," in the 14 line of the 1st paragraph of the first page, insert the following: "then and there in force in the State of Illinois and the common law then and there in force in the State of Ohio."

Third. After the words "common law," in the 2nd line of the second page, insert the following: "then and there in force in the State of Illinois and the common law then and there in force in the State of Ohio."

Fourth. After the words "common law," wherever the same appears in said notice of special defenses, thereafter must — the words heretofore mentioned.

O'DONNELL AND COGHLAN,
JOHN REID McFEE, AND
THOMAS B. LANTRY,
*Att'ys for Def't.*

(Endorsed:) Filed Jan. 26, 1900. S. W. Burnham, clerk.

41 Afterwards, to wit, on the 27th day of January, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

Circuit Court of the United States, Northern District of Illinois, Northern Division.

SATURDAY, *January* 27, 1900.

Present: Hon. Christian C. Kohlsaat, district judge.

UNION SEWER PIPE COMPANY }
*vs.* } 24361.
THOMAS CONNELLY. }

Now again come the parties, by their attorneys, and, the said jury having been excused from the further hearing in this cause until Monday morning next, now comes on to be heard the motion of the

plaintiff to have the jury instructed to return a verdict for the plaintiff herein, and the court, having heard the arguments of counsel on said motion and not being sufficiently advised, takes time to consider.

Afterwards, to wit, on the twenty-ninth day of January, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

41½ Circuit Court of the United States, Northern District of Illinois, Northern Division.

MONDAY, *January* 29, 1900.

Present: Hon. Christian C. Kohlsaat, district judge.

UNION SEWER PIPE COMPANY
*vs.* } 24361.
THOMAS CONNELLY.

Now again come the parties, by their attorneys, and come also said jury, and, the court having considered and being fully advised in the premises, it is ordered that the first and second notices of said defendant under plea of general issue be stricken out and third notice of matter of defenses under plea of general issue be also stricken out; and thereupon said jury by direction of court return their verdict finding for the plaintiff, and assess its damages at the sum of three thousand six hundred eighty-six dollars and twenty cents ($3,686.20), with interest; to which ruling of the court the defendant excepts and objects; thereupon the defendant enters his motion for a new trial, which is overruled; to which the defendant excepts and enters his further motion; to which the defendant excepts; and thereupon, on motion of plaintiff for judgment on the verdict, it is considered and adjudged by the court that the plaintiff do have and recover of said defendant the said sum of three thousand six hundred eighty-six dollars and twenty cents, together with the costs herein, to be taxed, and that execution issue therefor.

42 Pleas in the circuit court of the United States for the northern district of Illinois, northern division, begun and held at the United States court-room, in the city of Chicago, in said district and division, before the Hon. Christian C. Kohlsaat, district judge of the United States for said northern district of Illinois, on Monday, the twenty-ninth day of January, in the year of our Lord one thousand nine hundred, being one of the days of the regular December term of said court, 1899, and of our Independence the one hundred and twenty-fourth year.

S. W. BURNHAM, *Clerk*.

UNION SEWER PIPE COMPANY
*vs.*
WILLIAM E. DEE. } 24362.

Be it remembered that on this day, to wit, the eighth day of January, in the year of our Lord one thousand eight hundred and ninety-seven, came the plaintiff in said entitled cause, by its attorneys, and filed in the clerk's office of said court a certain præcipe in words and figures following, to wit:

43 *Præcipe.*

UNITED STATES OF AMERICA, }
*Northern District of Illinois, Northern Division,* } *ss.*:

Circuit Court, March Term, A. D. 1897.

UNION SEWER PIPE COMPANY
*vs.*
WILLIAM E. DEE. } Damages, $2,500.00.

The clerk of said court will issue a summons in said cause to said defendants in a plea of assumpsit to the damage of said plaintiff in the sum of two thousand five hundred (2,500) dollars, direct the same to the United States marshal for said district to execute, and make it returnable to the March term of said court, 1897.

Dated this eighth day of January, A. D. 1897.

HERBERT W. HAMLIN,
*Plaintiff's Attorney.*

To S. W. Burnham, Esq., clerk.

(Endorsed:) Filed Jan. 8, 1897. S. W. Burnham, clerk.

And on the same day, to wit, the eighth day of January, 1897, a summons issued out of the clerk's office directed against the defendant in said entitled cause; which summons, together with the marshal's return thereon endorsed, is in the words and figures following, to wit:

44 *Summons.*

Circuit Court of the United States of America, Northern District of Illinois, Northern Division, *ss.*:

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon William E. Dee, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March next, to answer unto Union Sewer Pipe Company, a corporation, of a plea of trespass on the case

upon promises, to its damage, as is alleged, of twenty-five hundred dollars; and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago aforesaid, this 8th day of January, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence the 121st year.

[SEAL.]

S. W. BURNHAM, *Clerk*.

I have served the within writ by reading the same to and within the presence and hearing of William E. Dee, therein named, on the 8th day of January, 1897.

J. W. ARNOLD,
*U. S. Marshal*,
By H. R. CLARK, *Deputy*.

(Endorsed:) Filed Jan. 11, 1897. S. W. Burnham, clerk

45 Afterwards, to wit, on the twenty-sixth day of February, 1897, came the plaintiff in said entitled cause, by its attorney, and filed in the clerk's office of said court a certain declaration in words and figures following, to wit:

*Declaration.*

Circuit Court of the United States, Northern District of Illinois, Northern Division, March Term, A. D. 1897.

STATE OF ILLINOIS, } *ss*:
*County of Cook*, }

The Union Sewer Pipe Company, a corporation organized under the laws of the State of Ohio, which is a citizen of the State of Ohio, plaintiff in this suit, by Herbert W. Hamlin, its attorney, complains of William E. Dee, who is a citizen of the State of Illinois, defendant in this suit, summoned, etc., of a plea of trespass of the case on promises:

For that whereas the said defendant heretofore, to wit, on the 20th day of August, A. D. 1895, at, to wit, said northern district of Illinois, made and concluded his certain contract and agreement in writing with the said plaintiff, which said contract is here brought into court, in words and figures following, to wit:

Memorandum of an agreement made and entered into this 20th day of August, A. D. 1895, between the Union Sewer Pipe Company, of the city of Akron, county of Summit and State of Ohio, party of the first part, and Wm. E. Dee, of the city of Chicago, county of Cook, State of Illinois, party of the second part, witnesseth:

The party of the first part agrees to sell and deliver to the party of the second part sewer pipe, free on board cars, at its factories at the following discounts off the western price-list, to wit:

46 First-class socket pipe from—

| | |
|---|---|
| 2″ to 20″ inclusive | 85 % |
| 24″ socket pipe | 80 % |
| 6″ and 9″ ring pipe rings | 85 % |
| 10″ and larger ring pipe with rings | 75 % |
| All sizes second-class socket pipe | 90 % |
| All sizes second-class ring pipe and rings | 87½ % |
| " " " " " " without rings | 90 % |
| Ring cull pipe with ring | 85 % |
| Ring cull pipe without rings | 87½ % |

All shipments by said first party in any one month to be settled for by note or acceptance of the second party, payable at bank in Chicago in ninety days from the tenth (10th) of the month following the month in which shipments are made, or if preferred by said second party settlement may be made in cash by the tenth of the month following the month in which the shipment is made and for such cash settlement an additional discount of two per cent. (2 %) on the net amount may be deducted from the bill, but in no case will the said first party accept city or town warrants in settlement of said shipment.

In consideration of the foregoing agreement the party of the second part agrees to purchase and handle exclusively, the sewer pipe handled and sold by the first party except when the first party is unable to furnish the party of the second part, and to place with the first party all orders for sewer pipe that they, the second party, may make.

In consideration of receiving the entire trade for sewer pipe from party of the second part, it is agreed by party of the first part that a rebate of one per cent. (1 %) of the gross sales be allowed said
47 second party. Said rebate to be paid second party at the close of each year provided the terms of this agreement have been faithfully carried out.

It is further agreed between said first party and said second party that said first party will supply the second party twenty-five car-loads of socket pipe of sizes 2″ to 20″ inclusive at 87½ % discount f. o. b. cars works. The above rebate of one per cent. will not apply on the pipe sold at 87½ % discount.

It is further agreed that said first party permits said second party to purchase twenty-five cars of sewer pipe from H. B. Camp, Greentown, Ohio, and twenty-five car-loads of pipe from the Chicago Sewer Pipe Co., Brazil, Indiana, but no more, and said second party consents to allow said first party access to his books to determine when above pipe has been delivered.

The said second party further agrees to sell on and after Sept. 1, '95, all sewer pipe purchased from the party of the first part free on board cars in car-load lots, or at their respective yards or places of business, in the city of Chicago, or in Cook county at the following discounts from the western price-list, namely:

6″ and 9″ ring pipe with rings and socket pipe up to and including 20″, on yard..... 70 % off list
24″ socket pipe on yard..... 60 % " "

By car-load lots, f. o. b. cars in Chicago:

6″ and 9″ ring pipe and rings and socket pipe up to and including 20″..... 75 % off list
24″ socket pipe..... 67½ " "

In no case shall seconds or culls be shipped by first party for use within the corporate limits of the city of Chicago.

Upon receipt of satisfactory evidence of violation of the terms of this agreement by said second party it is agreed between
48 the first and second parties that it remains optional with the first party to cancel this contract with the second party and the first party will refuse to sell pipe to said second party.

This contract may be terminated by either party giving the other thirty days' written notice of such desire.

In witness whereof we have hereunto affixed our hands and seals on the day and date first above written.

THE UNION SEWER PIPE CO.
B. W. ROBINSON, *Sec'y.*

(Signed) WM. E. DEE.

And the said plaintiff has well and truly fulfilled each and every part of the said contract by him to be performed, and has furnished to the said defendant at his, the said defendant's, special instance and request, at, to wit, the times and places hereinafter specified and at the prices in the said contract agreed upon and specified, goods, wares, and merchandise, to wit, sewer pipe, to a very large amount, as follows, to wit:

| | | | | | |
|---|---|---|---|---|---|
| 1896. | | | | | |
| June 2. | C., H. & D. car 2315: | | | | |
| | 480 pc 6″ pipe, 2′, rg. & rgs... | | .60.. | $288 | |
| | 200 " 6″ curves, 2′, soc..... | | 1. .. | 200 | |
| | 85 " 6″ P traps..... | | 2.40.. | 204 | |
| | | | | 692 | |
| | 35 St. & Shields Ave., 87½ %..... | | .. | 605 50 | |
| | | | | | 86 50 |
| " 3. | 1 pc. 24/20 tee, 3′, soc. ..... | | | 15 | |
| | 82½ %..... | | . . | 12 37 | |
| | | | | | 2 63 |
| | St. Charles, Ill. | | | | |
| " 4. | A. & Co. car 4410: | | | | |
| | 160 pc. 12″ pipe, 3′, rg. & rgs..... | | 2.25.. | 360 | |
| | 60 " 12/6 Y's, 2′, " " ..... | | 3. .. | 180 | |
| | 4 " 12/9 " " " " ..... | | " .. | 12 | |
| | | | | 552 | |
| | Addison St., 82 %..... | | .... | 452 64 | |
| | | | | | 99 36 |

" 4. A. & Co. car 1232:

| | | | |
|---|---|---|---|
| 160 pc. 12″ pipe, 3′, rg. & rgs | | 2.25 | 360 |
| 60 " 12/6 Y's, 2′, " " | | 3. | 180 |
| 4 " 12/9 " " " " | | 3. | 12 |
| | | | 552 |
| Addison St., 82 % | | | 452 64 |
| | | | 99 36 |

" 4. O. & M. car 5849:

| | | | |
|---|---|---|---|
| 160 pc. 12″ pipe, 3′, rg. & rgs. | | 2.25 | 360 |
| 60 " 12/6 Y's, 2′, " " | | 3. | 180 |
| 4 " 12/9 " " " " | | " | 12 |
| | | | 552 |
| Addison St., 82 % | | | 452 64 |
| 49 | | | 99 36 |

" 4. B. & O. car 36369:

| | | | |
|---|---|---|---|
| 864 pc. 16″ pipe, 2′ 1, rg. & rgs | | .60 | 518 40 |
| 50 " 6″ curves, 2′, soc | | 1. | 50 |
| | | | 568 40 |
| W. 46th & 12th St., 87½ % | | | 497 35 |
| | | | 71 05 |

" 4. A. & Co. car 1286:

| | | | |
|---|---|---|---|
| 864 pc. 6″ pipe, 2, rg. & rgs | | .60 | 518 40 |
| 50 " 6″ curves, 2′, soc. | | 1. | 50 00 |
| | | | 568 40 |
| W. 46th & 12th St., 87½ % | | | 497 35 |
| | | | 71 05 |

" 4. A. & Co., 1487:

| | | | |
|---|---|---|---|
| 864 pc. 6″ pipe, 2′, rg. & rgs | | .60 | 518 40 |
| 50 " 6′ curves, 2′, soc | | 1. | 50 |
| | | | 568 40 |
| W. 46 & 12 St., 87½ % | | | 497 35 |
| | | | 71 05 |

" 4. A. & Co. car 1294:

| | | | |
|---|---|---|---|
| 160 pc. 12″ pipe, 3′, rg. & rgs. | | 2.25 | 360 |
| 60 " 12/6 Y's, 2′, " " | | 3. | 180 |
| 4 " 12/9 " 2′, " " | | 3. | 12 |
| | | | 552 |
| Addison St., 82 % | | | 452 64 |
| | | | 99 36 |

" 4. A. & Co. car 1245:

| | | | |
|---|---|---|---|
| 160 pc. 12″ pipe, 3′, rg. & rgs. | | 2.25 | 360 |
| 60 " 12/6 Y's, 2′, " " | | 3. | 180 |
| 4 " 12/9 " " " " | | " | 12 |
| | | | 552 |
| Addison St., 82 % | | | 452 64 |
| | | | 99 36 |

" 4. C., C., C. & St. L. car 16073:

| | | | |
|---|---|---|---|
| 100 pc. 6″ pipe, 2′, rg. & rgs. | | .60 | 60 |
| 100 " 4″ " " soc. | | .40 | 40 |
| 720 " 6″ " " soc. | | .60 | 432 |
| 50 pc. 6/6 Y's, 2′, soc. | | 1.20 | 60 |
| 50 " 6″ elbows, " | | 1. | 50 |
| 20 " 6″ curves, 2′, " | | 1. | 20 |
| 10 " 6/4 Y's, 2′, " | | 1.20 | 12 |
| 20 " 4″ elbows, " | | .60 | 12 |
| | | | 686 |
| 47 & Throop St., 87½ % | | | 600 25 |
| | | | 85 75 |

" 4. T., St. L. & K. C. car 3218:

| | | | |
|---|---|---|---|
| 160 pc. 12" pipe, 3', rg. & rgs | 2.25 | 360 | |
| 60 " 12/6 Y's, 2', " " | 3. | 180 | |
| 4 " 12/9 " " " | 3. | 12 | |
| | | 552 | |
| Addison St., 82 % | | 452 64 | |
| | | | 99 36 |

" " G., R. & I. car 3389:

| | | | |
|---|---|---|---|
| 160 pc. 12" pipe, 3', rg. & rgs | 2.25 | 360 | |
| 60 pc. 12/6 Y's, 2', " " | 3. | 180 | |
| 4 " 12/9 " " " | 3. | 12 | |
| | | 552 | |
| Addison St., 82 % | | 452 64 | |
| | | | 99 36 |

" 4. A. & Co. car 1275:

| | | | |
|---|---|---|---|
| 450 pc. 6" pipe, 2', soc. | .60 | 270 | |
| 400 " 6" slants, 2', rg. & rgs | .90 | 360 | |
| 100 " 9" " " " " | 1.50 | 150 | |
| | | 780 | |
| Addison St., 87½ % | | 682 50 | |
| | | | 97 50 |

" 4. B. & O. car 12633:

| | | | |
|---|---|---|---|
| 200 pc. 6" pipe, 2', #2 | .60 | 120 | |
| 92 % | | 110 40 | |
| | | 9 60 | |
| 50 pc. 4" pipe, 2', #1 | .40 | 20. | |
| 400 pc. 6" pipe, 2', #1 | 60c | 240. | |
| 50 " 6" curves, " 1 | | 50. | |
| 30 " 6" elbows, #1 | 1. | 30. | |
| 24 " 6/4 H. H. traps | 2.90 | 69.60 | |
| 20 " 6/6 Y's, 2' | 1.20 | 24. | |
| 12 " 6/4 T's, " | " | 14 40 | |
| 12 " 4" elbows | .60 | 7.20 | |
| 6 " 6/4 Y's, 2 ft | 1.20 | 7.20 | |
| 6 4" crotch vents | .80 | 4.80 | |
| | | 467.20 | |
| Desplaines St., 87½ % | | 408.80 | |
| | | 58 40 | |
| | | | 68 00 |

" 5. A. C., 1344:

| | | | |
|---|---|---|---|
| 864 pc. 6" pipe, 2', rg. & rgs | .60 | 518 40 | |
| 50 " 6" curves, 2', soc | 1. | 50 | |
| | | 568 40 | |
| 46 & 12 St., 87½ % | | 497 35 | |
| | | | 71 05 |

" 5. T., St. L. & K. C. car 3437:

| | | | |
|---|---|---|---|
| 520 pc. 10" pipe, 2 ft., #1 | 1.20 | 624 | |
| 50 " 10/6 " " " | 2.40 | 120 | |
| 2 " 12" curves, " " | 2.75 | 5 50 | |
| | | 749 50 | |
| H. O. Foley, Waukegan, Ill., 87½ % | | 655 81 | |
| | | | 93 69 |

" 6. O. & M. car, 5904:

| | | | |
|---|---|---|---|
| 840 pc. 6" pipe, 2 ft., #1 | .60 | 504 | |
| 46 St. & 12 St., 87½ % | | 441 | |
| | | | 63 |

" 6. C. & N. W., 46742:

| | | | |
|---|---|---|---|
| 840 pc. 6″ pipe, 2′, ♯1 | | .60.. | 504 |
| Elsmere sta., 87½% | | | 441 |
| | | | 63 |

" 11. C., A. & C., 10849:

| | | | |
|---|---|---|---|
| 700 pc. 6″ pipe, 2 ft., ♯1 | | .60.. | 420 |
| 100 " 4″ P traps | | 1.60.. | 160 |
| 20 " 9/6 Y's, " ♯1 | | 2. .. | 40 |
| | | | 620 |
| 35 St. & Shields Ave., 87½% | | | 542 50 |
| | | | 77 50 |

" 11. A. & Co., 1614:

| | | | |
|---|---|---|---|
| 736 pc. 6″ pipe, 2′, ♯1 | | .60.. | 453 60 |
| Addison St. sta., 87½% | | | 396 90 |
| | | | 56 70 |

" 12. A. & Co., 1647:

| | | | |
|---|---|---|---|
| 756 pc. 6″ pipe, 2′, ♯1 | | .60.. | 453 60 |
| Addison St., 87½% | | | 396 90 |
| | | | 56 70 |

" 16. C. & P. car, 18868:

| | | | |
|---|---|---|---|
| 120 pc. 15″ pipe, 3′, rg. & rgs | | 3. .. | 360 |
| 40 " 15/6 Y's, 2′, " " | | 4. .. | 160 |
| 20 " 15/6 " 3′, " " | | 5. .. | 100 |
| | | | 620 |
| 82% | | | 508 40 |
| | | | 111 60 |
| 20 pc. 9″ hf. traps, 1.75 | | 35. .. | |
| Addison St., 87½% | | 30.62.. | |
| | | | 4 38 |
| | | | 115 98 |

" 16. C., A. & C., 10178:

| | | | |
|---|---|---|---|
| 798 pc. 6″ pipe, 2′, ♯1 | | .60.. | 478 80 |
| 35 St. & Shields Ave., 87½% | | | 418 95 |
| | | | 59 85 |

" 23. A. & Co., 1250:

| | | | |
|---|---|---|---|
| 25 pc. 20″ pipe, 2′, ♯1 | | 3.50.. | 87.50 |
| 20 " 18″ " " " | | 3. .. | 60 |
| 85 " 15″ " " " | | 2. .. | 170 |
| 50 " 12″ " " " | | 1.50.. | 75 |
| 1 " 20/12 T, " " | | | 7 |
| 1 " 20/9 " " " | | | 7 |
| 5 " 15/9 T's, " " | | 4. .. | 20 |
| 3 " 12/9 " " " | | 3. .. | 9 |
| | | | 435 50 |
| St. Charles, Ill., 87½ | | | 381 06 |
| | | | 54 44 |

" 25. A. & Co., 1691:

51

| | | | |
|---|---|---|---|
| 260 pc. 12″ pipe, 2′, ♯1 | | 1.50.. | 390 |
| 46 " 12/6 Y, " " | | 3. .. | 138 |
| 22 " 9″ hf. traps, 2′, ♯1 | | 1.75.. | 38 50 |
| | | | 566 50 |
| Forest Home, Ill., 87½% | | | 495 69 |
| | | | 70 81 |

" 26. T., P. & W., 2085:

| | | | |
|---|---|---|---|
| 260 pc. 12″ pipe, 2′, ♯1 | | 1.50.. | 390 |
| 42 " 9″ " " " | | 1. .. | 42 |
| 45 " 12/6″ Y's, " " | | 3. .. | 135 |
| | | | 567 |
| Forest Home, Ill., 87½% | | | 496 12 |
| | | | 70 86 |

| | | | | |
|---|---|---|---|---|
| " 26. | A. & C., 1865: | | | |
| | 260 pc. 12" pipe, 2', #1 | 1.50 | 390 | |
| | 41 " 9" " " " | 1. | 41 | |
| | 22 " 12/9 Y's, " " | 3. | 66 | |
| | 23 " 12/6 " " " | 3. | 69 | |
| | | | 566 | |
| | Forest Home, Ill., 87½% | | 495 25 | |
| | | | | 70 75 |
| " 26. | 260 pc. 12" pipe, 2', #1 | 1.50 | 390 | |
| | 42 " 9" " " " | 1. | 42 | |
| | 45 " 12/9 Y's, " " | 3. | 135 | |
| | | | 567 | |
| | Forest Home, Ill., 87½% | | 496 12 | |
| | | | | 70 88 |
| " 29. | In car 2085: | | | |
| | 159 pc. 6" stoppers | .10 | 15 90 | |
| | Forest Home, Ill., 87½% | | 13 91 | |
| | | | | 1 99 |
| | Omitted from original invoice 6/26. | | | |
| " 30. | A. & Co., 1898: | | | |
| | 150 pc. 4" pipe, 2', soc. | .40 | 60 | |
| | 250 " 6" " rg., " | .60 | 150 | |
| | 500 " 6" " soc., " | .60 | 300 | |
| | 40 " 6" elbows | 1.00 | 40 | |
| | 70 " 6/6 Y's | 1.20 | 84 | |
| | 30 " 4" elbows | .60 | 18 | |
| | 15 " 6/4 Y | 1.20 | 18 | |
| | 25 " 6" curves | 1. | 25 | |
| | 12 " 4" P traps | 1.60 | 19 20 | |
| | 15 " 6" " " | 2.40 | 36 | |
| | | | 750 20 | |
| | Maplewood Sta., Ill., 87½% | | 656 43 | |
| | | | | 93 77 |
| July 28. | Prepaid freight on car 1898, shipped 6, 30, '96 | | | 49 22 |
| | | | | $2,389 26 |

Whereby the said defendant has become indebted to the said plaintiff in the sum of two thousand three hundred and eighty-nine dollars and twenty-six cents ($2,389.26), long since due; which said sum is the price agreed upon in the said contract for said goods, wares, and merchandise; and, being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to
52 wit, on the first day of October, A. D. 1896, at, to wit, the said northern division of Illinois, undertook and then and there faithfully promised the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested.

And whereas the said defendant heretofore, to wit, on the first day of October, A. D. 1896, to wit, in the district aforesaid, became and was indebted to the said plaintiff in the sum of two thousand five hundred dollars ($2,500), of lawful money of the United States of America for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the said defendant and at the special instance and request of the said defendant, and, being so

indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested;

And whereas also the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaintiff in the further sum of two thousand five hundred dollars ($2,500) of like lawful money, as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant and at the like request of the said defendant;

And in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the like request of the said defendant;

And in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff;

53 And in the like sum for other money before that time and then and there due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff;

And in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the said defendant;

And, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested;

And whereas also the said defendant afterwards, to wit, on the day and year last aforesaid, and at the place last aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff and then and there being in arrears and unpaid, and upon such accounting the said defendant then and there was found to be in arrears and indebted to the said plaintiff in the further sum of two thousand five hundred dollars ($2,500) of like lawful money, as aforesaid; and, being so found in arrears and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested:

Nevertheless the said defendant, though often requested,

54 etc., has not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused and

still does refuse, to the damage of the said plaintiff of two thousand five hundred dollars ($2,500), and therefore the said plaintiff brings suit, etc.

HERBERT W. HAMLIN,
*Plaintiff's Attorney.*

*Copy of Account Sued On.*

William E. Dee to Union Sewer Pipe Company, Dr.

| | |
|---|---|
| To goods, wares, and merchandise sold and delivered | $2,500 |
| To money lend and advanced | 2,500 |
| To money paid, laid out, and expended | 2,500 |
| To money had and received to and for use of pl'tf | 2,500 |
| To money due for interest and forbearance | 2,500 |
| To labor, services, and material | 2,500 |
| To balance due on account stated | 2,500 |

*Plaintiff's Affidavit of Amount Due.*

Circuit Court of the United States, N. Dist. Ill., N. Div., March Term, A. D. 1897.

UNION SEWER PIPE COMPANY )
*vs.*
WILLIAM E. DEE. )

Herbert W. Hamlin, being first duly sworn, says that he is the attorney of the plaintiff in the above-entitled cause, and that the demand of the said plaintiff is for goods, wares, and merchandise furnished by the said plaintiff to the said defendant, and that there is due to the plaintiff from the defendant, after allowing to him all just credits, deductions, and set-offs, the sum of two thousand three hundred and eighty-nine dollars and twenty-six cents ($2,389.26), with interest from October 1st, 1896.

HERBERT W. HAMLIN.

Subscribed and sworn to before me this 25th day of February, A. D. 1897.

[SEAL.] MAUDE B. JONES,
*Notary Public.*

(Endorsed:) Filed Feb. 26, 1897. S. W. Burnham, clerk.

55 And on the twenty-ninth day of March, 1897, came the defendant in said entitled cause, by its attorney, and filed in the clerk's office of said court its plea in words and figures following, to wit:

*Plea.*

STATE OF ILLINOIS, } ss:
*County of Cook,* }

Circuit Court of the United States, Northern District of Illinois, Northern Division, March Term, A. D. 1897.

UNION SEWER PIPE COMPANY } No. 24362. Law.
*vs.*
WILLIAM E. DEE. }

And the defendant, by Richard Prendergast and J. E. Deakin, his attorneys, comes and defends the wrong and injury when, etc., and says that he did not promise in manner and form as the plaintiff has above thereof complained against him; and of this he puts himself upon the country, etc.

RICHARD PRENDERGAST,
J. E. DEAKIN,
*Attorneys for Defendant.*

STATE OF ILLINOIS, } ss:
*County of Cook,* }

William E. Dee makes oath and says that he is the defendant in the above-entitled cause; he verily believes he has a good defense to this suit upon the merits and to the whole of the plaintiff's demand.

WILLIAM E. DEE.

Subscribed and sworn to this 26th day of March, 1897, before me—

THOS. D. LANTRY,
[SEAL.] *Notary Public.*

(Endorsed:) Filed March 29, 1897. S. W. Burnham, clerk.

56 Afterwards, to wit, on the twentieth day of April, 1898, in the December term of said court, 1897, in the record of proceedings thereof in said entitled cause, before the Hon. John W. Showalter, circuit judge, appears the following entry, to wit:

*Order of April 20, 1898.*

UNION SEWER PIPE COMPANY } 24362. Assumpsit.
*vs.*
WILLIAM E. DEE. }

Now come the parties, by their attorneys, and the defendant has leave to withdraw the special pleas herein and file instanter, under the general issue, notice of special defences and set-off.

57 And on the same day, to wit, the twentieth day of April, 1898, came the defendant, by its attorney, and filed in the

clerk's office of said court its notices of special defenses and set-offs under general issue in words and figures following, to wit:

*Notices of Special Defenses and Set-offs under General Issue.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

In the Circuit Court of the United States in and for the Northern District of Illinois.

THE UNION SEWER PIPE COMPANY } Gen. No., 24362.
*vs.*
WILLIAM E. DEE. }

And the defendant, by Richard Prendergast and J. E. Deakin, his attorneys, comes and defends the wrong and injury when, etc., and says that he did not promise in manner and form as the plaintiff has above thereof complained against him; and of this he puts himself on the country, etc.

RICHARD PRENDERGAST AND
J. E. DEAKIN.

*Notice of Special Defenses.*

Take notice that upon the trial of this action the defendant will, in defense thereto, rely on the special matters hereinafter stated—that is to say:

Firstly. That the plaintiffs — and at all times since about the 1st day of January, 1893, has been a trust or combination of the capital, skill, and acts of divers persons and corporations carrying
58 on a commercial business in the States of Ohio and Illinois and between said States and elsewhere in the United States of America, and organized for the express purpose of unlawfully and contrary to the common law creating and carrying out restrictions in trade, to wit, in the trade of buying, selling, and otherwise dealing in certain articles of merchandise, to wit, sewer and drainage pipes; and also for the express purpose of unlawfully and contrary to the common law limiting the production of said articles of merchandise and increasing the market price thereof; and also for the express purpose of unlawfully and contrary to the common law preventing competition in the manufacturing, making, transportation, sale, or purchase of said articles of commerce; also for the express purpose of unlawfully and contrary to the common law fixing standards or figures whereby the prices of said articles of merchandise intended for sale, use, and consumption in this State should be controlled and established; and also for the express purpose of unlawfully and contrary to the common law being a pretended agency whereby the sale of said articles of commerce should and might be covered up and made to appear to be for the original vendors thereof, and so as to enable the original vendors or manufacturers thereof to control the wholesale and retail price of such articles

of commerce after the title thereto had passed from such vendors or manufacturers; and for the further express purpose of unlawfully and contrary to the common law making and entering into and carrying out a certain contract or certain contracts by which the several persons or corporations forming the plaintiff or being the pretended stockholders thereof, to wit, have bound themselves not to sell, dispose of, or transport said articles of commerce below certain common standards, figures, or card or list prices in excess of the true market values thereof, and by which they have agreed to keep the prices of said articles of commerce at certain fixed or graduated figures, and by which they have established certain settled prices of said articles of com-
59 merce between themselves and others so as to preclude a free and unrestricted combination among themselves and others in the sale and transportation of said articles of commerce, and by which they had agreed to pool, combine, and unite any interests they may have in connection with the sale and transportation of said articles of commerce so that the prices thereof may effect advantageously to themselves; that all the claims of the plaintiff against the defendant in this action arise wholly out of and are in respect of sales of said articles of merchandise made between the 25th day of February, 1893, and the 30th day of June, 1896, to the defendant by the plaintiff in the ordinary course of its business as such a trust or combination, acting as aforesaid, and that this action is brought to recover the alleged price thereof and for no other purpose.

Secondly. That the plaintiff is and at all times since the 1st day of January, 1893, was a combination in the form of a trust in restraint of trade and commerce among the several States and doing business as such throughout the United States and between the States of Ohio and Illinois, contrary to the provisions of an act of Congress of date July 2nd, 1890, and entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes sold to the defendant by the plaintiff, then and there acting and doing business as such a combination, as aforesaid, in violation of the provisions of said act.

Thirdly. That the plaintiff is and at all times since the 1st day of January, 1893, was a trust and doing business as such in the State of Illinois and elsewhere, contrary to the provisions of an act of the legislature of the State of Illinois entitled "An act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void, and making certain acts and violations thereof misdemeanors and prescribing punishment
60 thereof and matters connected therewith, approved June 20, 1893; in force July 1st, 1893;" that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes sold to defendant by plaintiff, then and there acting and doing business in violation of the provisions of said act, and that the defendant hereby pleads said act in defense to this action and the whole thereof.

*Notice of Set-offs.*

Take further notice that on the trial of this cause the defendant will give in evidence and insist that the plaintiff was before and at the time of the commencement of this suit and still is indebted to the defendant in the sum of seventy-six thousand and five hundred and twenty dollars, for that the plaintiff is and ever since the 1st day of January, 1893, was a combination, in the form of a trust, in restraint of trade and commerce between the State of Illinois and Ohio and between other States within the United States, and that by reason of the plaintiff being such a combination and as the direct, inevitable, and proximate result thereof the defendant has been injured in his business by reason of acts and things done by the plaintiff and forbidden and declared to be unlawful by an act of Congress of date June 2nd, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," to wit, the selling by the plaintiff, while residing and carrying on business in the State of Ohio, at divers times between the 25th day of February, 1893, and the 30th day of June, 1896, of divers goods and merchandise, to wit, sewer and drainage pipes, to the defendant while residing and carrying on business in the State of Ohio, which goods and merchandise the defendant was, by force of circumstances beyond the reasonable control of the defendant and wrongfully and designedly brought about solely by the plaintiff with
61 intent to coerce the defendant into purchasing said goods and merchandise, compelled to obtain from and purchase of the plaintiff at prices largely in excess of the true and real market price thereof—that is to say, the defendant was compelled, as aforesaid, to pay and did pay to the plaintiff for said sewer and drainage pipes shipped between said dates by the plaintiff from the State of Ohio to the defendant in the State of Illinois the sum of $23,840.00 over and in excess of the true and real market value thereof, whereby the defendant lost and was actually damaged in his business of a sewer contractor in the sum of $23,840.00. Wherefore the defendant now claims under and by virtue of the provisions of said act of Congress, by way of set-off against the plaintiff in this action, the said sum of $76,520.00, being three times the amount of his said actual loss and damage, together with reasonable attorneys' fee, to wit, $5,000, and his costs of suit.

And take further notice that the defendant will also give in evidence and insist that the plaintiff was and at the time of the commencement of this suit and still is indebted to the defendant in the sum of twenty-three thousand eight hundred and forty dollars ($23,840.00), damages sustained by the defendant by reason of the plaintiff's becoming and since the 1st day of January, 1893, continuing to be and trade as a trust or combination of persons and corporations doing business in the States of Ohio and Illinois and between said States, organized for the express purpose of unlawfully and contrary to the provisions of an act of the legislature of the State of Illinois entitled "An act to define trusts and conspiracies

against trade, declaring contracts in violation of the provisions of this act void, and making certain acts and violations thereof misdemeanors, and proscribing punishment thereof and matters connected therewith, approved June 30th, 1893, in force July 1st, 1893," and that by reason of the plaintiff being and doing business as such a trust or combination, as aforesaid, the defendant was, by force of circumstances beyond his
62 reasonable control, and which existed and were wrongfully and designedly brought about by the plaintiff with intent to coerce *of* the defendant into *to* purchasing only from the plaintiff, compelled to obtain from and did obtain from the plaintiff between the 25th day of February, 1893, and the 30th day of June, 1896, large quantities of certain merchandise, to wit, sewer and drainage pipes, and was compelled to pay and did pay therefor the sum of $126,940.00, which amount was largely in excess of the true and real market value thereof, to wit, the sum of $103,100.00.

And take further notice that the defendant will give in evidence and insist that the plaintiff was and before and at the time of the commencement of this suit and still is indebted to the defendant in the sum of twenty-three thousand eight hundred and forty dollars, money had and received by the plaintiff to the use of the defendant, in that the plaintiff became on or about the 1st day of January, 1893, and has ever since continued to be and operate as a trust or combination of persons and corporations doing business in the State of Ohio and between said State and the State of Illinois, and organized and existing for the express and sole purpose of unlawfully controlling and regulating, in restraint of trade and contrary to the common law, the market prices of certain articles of commerce, to wit, sewer and drainage pipes; that the defendant was compelled, wholly by reason of the existence of such a trust or combination and of the pressure of circumstances beyond reasonable control of the defendant, and wrongfully and designedly brought about by the plaintiff with intent to coerce the defendant into purchasing only of the plaintiff, to purchase and did purchase from the plaintiff, acting and doing business as such a trust or combination, at various dates between the 25th day of February, 1893, and the 30th day of June, 1896, large quantities of said articles of commerce of the true and real market value of $103,100.00, and no more, at the unreasonable, exorbitant, fictitious, and compulsory price of $126,940.00.

63 And on the *trail* of this action the defendant will set off and allow to the plaintiff, against any true and lawful demand on its part to be proved on such trial, so much of the said sums of money so due from the plaintiff to the defendant, as aforesaid, as will be sufficient to satisfy and discharge such demand.

RICHARD PRENDERGAST AND
J. E. DEAKIN.

(Endorsed:) Filed Apr. 20, 1898. S. W. Burnham, clerk.

64 Afterwards, to wit, on the fourteenth day of May, 1898, in the December term of said court, 1897, in the record of pro-

ceedings thereof in said entitled cause, before the Hon. William J. Allen, district judge, appears the following entry, to wit:

*Order of May* 14, 1898.

UNION SEWER PIPE COMPANY
*vs.*
WILLIAM E. DEE. } 24362. Assumpsit.

Now come the parties, by their attorneys, and, on motion of plaintiff, it is ordered that the defendant be, and hereby is, ruled to file bill of particulars in support of defendant's plea of set-off in ten days.

Afterwards, to wit, on the twenty-third day of May, 1898, in the December term of said court, 1897, in the record of proceedings thereof in said entitled cause, before the Hon. William J. Allen, district judge, appears the following entry, to wit:

65 Circuit Court of the United States, Northern District of Illinois, Northern Division.

MONDAY, *May* 23, 1898.

Present: Hon. William J. Allen, district judge.

UNION SEWER PIPE COMPANY
*vs.*
WILLIAM E. DEE. } 24362. Assumpsit.

Now come the parties, by their attorneys, and the time to file bill of particulars is hereby extended twenty days.

Afterwards, to wit, on the fifteenth day of September, in the July term of said court, 1898, in the record of proceedings thereof in said entitled cause, before the Hon. John W. Showalter, circuit judge, appears the following entry, to wit:

66 Circuit Court of the United States, Northern District of Illinois, Northern Division.

THURSDAY, *September* 15, 1898.

Present: Hon. John W. Showalter, circuit judge.

THE UNION SEWER PIPE CO.
*vs.*
WILLIAM E. DEE } 24362. Assumpsit.

Now, on this day, come the parties, by their attorneys, and the plaintiff has leave to increase the *ad damnum* herein to the sum of three thousand dollars, and, on the plaintiff's motion, the defendant is ruled to file his bill of particulars in fifteen days.

Afterwards, to wit, on the twenty-seventh day of September, 1898, came the defendant in said entitled cause, by his attorney, and filed in the clerk's office of said court a certain bill of particulars in words and figures following, to wit:

67 *Bill of Particulars.*

UNITED STATES OF AMERICA, )
*Northern District of Illinois, Northern Grand Division,* ) ss:

In the Circuit Court Thereof.

UNION SEWER PIPE COMPANY )
*vs.* ) Gen. No., 24362.
WILLIAM E. DEE. )

Bill of particulars.

Now comes the defendant and files this his bill of particulars pursuant to the rule heretofore entered in the above-entitled cause, viz:

*First Set-off.*

Treble the amount of the actual damages sustained allowed by act of Congress of date June 2nd, 1890, to wit:

| | |
|---|---|
| Overcharge of 5% on 644 cars of ring pipe and fittings paid for by defendant between Feb. 24th, 1893, and June 30th, 1896, at the average price of about $500.00 per car, $16,100.00 | $48,300.00 |
| Overcharge of 2½% on 512 cars of socket pipe paid for by defendant between Feb. 24th, 1893, and June 30th, 1896, at the average rate of about $600.00 per car, $7,680.00 | 23,040.00 |
| Reasonable attorneys' fees allowed by said act | 5,000.00 |
| | $76,340.00 |

*Second Set-off.*

| | |
|---|---|
| Actual damages sustained by the defendant by reason of plaintiff's violation of an act of the legislature 68 of the State of Illinois entitled "An act to define trusts and conspiracies, etc., in force July 1st, 1893," as above set forth, of 5% more than market value of 644 cars of ring pipe and fittings at average price of about $500.00 per car | $16,100.00 |
| Of 2½% more than market value of 512 cars of socket pipe at average price of about $600.00 per car | 7,680.00 |
| | $23,780.00 |

*Third Set-off.*

To money had and received by plaintiff of defendant contrary to law, viz., 5% of $322,000.00..... $16,100.00
2½% of $307,200.00..... 7,680.00

$23,780.00

Respectfully submitted.

RICHARD PRENDERGAST,
J. E. DEAKIN,
JNO. REID McFEE,
*Attorneys for Defendant.*

(Endorsed:) Filed September 27, 1898. S. W. Burnham, clerk.

69 And on the 16th day of January, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

Circuit Court of the United States, Northern District of Illinois, Northern Division.

TUESDAY, *January* 16, 1900.

Present: Hon. Christian C. Kohlsaat, district judge.

UNION SEWER PIPE CO. *vs.* WILLIAM E. DEE. } 24362.

Now come the parties, by their attorneys, and the defendant has leave to file an amendment to his notice of set-off under the plea of general issue herein.

On the same day, to wit, the sixteenth day of January, 1900, came the defendant in said entitled cause, by his attorneys, and filed in the clerk's office of said court an amendment to notice of set-off in words and figures following, to wit:

*Amendment to Notice of Set-off.*

UNITED STATES OF AMERICA, } ss:
*Northern District of Illinois,* }

In the Circuit Court of the United States in and for the Northern District of Illinois.

THE UNION SEWER PIPE COMPANY }
*vs.* } Gen. No., 24362.
WILLIAM E. DEE. }

Amendment of notice of set-off filed by leave of court first had and obtained.

1st. Insert after the word "demand," the last word in said
70 notice of set-off, the following, viz:

And you will further take notice that at the trial of said cause the defendant will give in evidence and insist that all and singular the matters and defenses hereinbefore specially given notice of arose out of sales of goods, wares, and merchandise made by the plaintiff to the defendant, the prices of which are sought to be recovered in this action, and that such sales were made in furtherance of and connected with the unlawful combination in the nature of a trust, as aforesaid, and that the prices charged for the said goods, wares, and merchandise so sold and the prices of other goods, wares, and merchandise sold and delivered by the plaintiff to the defendant and paid for by him were unreasonable and produced by the unlawful combination in the nature of a trust aforesaid, and that this defendant does set off the amount of such unreasonable prices so produced in excess of the actual value and reasonable prices at the time of such sales as damage to the plaintiff's demand in this action, and will ask judgment against the plaintiff for such excess; and

You will take further notice that the defendant will do all this in connection with all and singular the other matters of set-off of which you have heretofore been given notice.

JOHN REID McFEE,
*Attorney for Plaintiff.*

(Endorsed:) Filed Jan. 16, 1900. S. W. Burnham, clerk.

71 Afterwards, to wit, on the twenty-second day of January, 1900, came the plaintiff, by its attorney, and filed in the clerk's office of said court a certain motion in words and figures following, to wit:

*Motion.*

United States Circuit Court, Northern District of Illinois.

THE UNION SEWER PIPE COMPANY )
*vs.*
WILLIAM E. DEE. )

Comes now the plaintiff, by its attorneys, and moves the court to strike from the files the notices of special defense and set-off hereinbefore filed by the defendant in the above-entitled cause, for the reason that said notices and each of them are wholly insufficient and inconsistent.

HERBERT W. HAMLIN,
*Att'y for Plaintiff.*

EDWIN WALKER, *Of Counsel.*

(Endorsed:) Filed Jan. 22, 1900. S. W. Burnham, clerk.

Afterwards, to wit, on the twenty-third day of January, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

72 Circuit Court of the United States, Northern District of Illinois, Northern Division.

TUESDAY, *January* 23, 1900.

Present: Hon. Christian C. Kohlsaat, district judge.

UNION SEWER PIPE CO. )
*vs.* No. 24362.
WILLIAM E. DEE. )

Now come the parties, by their attorneys, and leave is hereby given John Reed McFee and Thomas Lantry to enter their appearance as attorneys herein, vice J. E. Deakin, deceased, and the plaintiff has leave to strike out the first or special count of said declaration and substitute and file instanter in place of said first count withdrawn two amended counts, the plea on file to stand to said additional counts, together with notices of special defenses, under plea of general issue, and thereupon the plaintiff files written motion to strike from the files the notices of special defenses under said plea of general issue, and the arguments of counsel on said motion being partly heard when the hour for adjournment arrived, the further hearing of this motion is postponed until tomorrow morning.

On the same day, to wit, the twenty-third day of January, 1900, came the plaintiff in said entitled cause and, by leave of court first had and obtained by its attorney, filed in the clerk's office of said court, filed certain amended counts in words and figures following, to wit:

73 UNITED STATES OF AMERICA, } ss:
*Northern District of Illinois,* }

In the Circuit Court of the United States in and for the Northern District of Illinois.

THE UNION SEWER PIPE COMPANY }
*vs.* } Gen. No., 24362.
WILLIAM E. DEE. }

To John R. McFee and O'Donnell and Coghlan, att'ys for def't:

Please take notice that on Tuesday, the 23rd day of January, 1900, at ten o'clock a. m., or as soon thereafter as counsel can be heard, I shall, before his honor Judge Kohlsaat, in the room usually occupied by him as a court-room, in the Monadnock block, in the city of Chicago, ask leave to strike out of the deposition heretofore filed by plaintiff the first or special count and to substitute therefor two amended counts, a copy of which amended counts is hereby served upon you and ap-ended hereto.

EDWIN WALKER,
HERBERT HAMLIN,
*Attorneys for Plaintiff.*

Received a copy of the foregoing notice, with copy of amended counts, this 22 day of January, 1900.
Attorneys for defendant, J. R. McFEE,
By L.
O'DONNELL & COGHLAN,
*Att'ys for Defendant.*

74 UNITED STATES OF AMERICA, } ss:
*Northern District of Illinois,* }

In the Circuit Court of the United States in and for the Northern District of Illinois.

THE UNION SEWER PIPE COMPANY }
*vs.* } Gen. No., 24362.
WILLIAM E. DEE. }

*Amendment of Plaintiff's Declaration Filed by Leave of Court First Had and Obtained.*

First. Strike out of said declaration all of the first or special count thereof, beginning on page one with the words "For that whereas, etc.," and ending with the words "when the said defendant should be thereunto afterwards requested" at the bottom of page eight (8) of the said declaration.

Second. Substitute in place of the said first count now withdrawn, and in the position in the said declaration heretofore occupied by the said count, two amended counts, as follows:

For that whereas, heretofore, to wit, on the 2, 3, 4, 5, 6, 11, 12, 16,

23, 25, 26, 29, and 30 days of June, 1896, and the 28th day of July, 1896, and on divers other days in the said year 1896, at, to wit, the town of Akron, in the county of Summit and State of Ohio, in consideration that the said plaintiff, at the special instance and request of the said defendant, would deliver to him, the said defendant, at, to wit, the said town of Akron, a certain quantity of goods, to wit, divers pieces of sewer pipe, and should prepay the freight charges on a part of the same, on the terms that he, the defendant, should purchase the same and repay the said prepaid freight charges at and for a certain price, including the amount of said freight
74½ charges, to wit, the sum of two thousand three hundred and eighty-nine dollars and twenty-six cents ($2,389.26), for which goods and freight charges the said sum was a just, fair, and proper charge as the prices of sewer pipe in the market were then quoted, he, the said defendant, then and there undertook and faithfully promised the said plaintiff to purchase the said goods of it and to pay to it the said price thereof and *to* the said freight charges within a reasonable time then next following; and the said plaintiff in fact saith that it, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the days and years aforesaid, at the said town of Akron aforesaid, deliver to the said defendant the said quantity of goods on the terms aforesaid, and did prepay the said freight charges, and was always ready and willing to sell the said goods to and to prepay said freight charges to the said defendant at the said price, to wit, the price of two thousand three hundred and eighty-nine dollars and twenty-six cents ($2,389.26), whereof the said defendant had then and there notice; and the said plaintiff in fact saith that a reasonable time for the said defendant's purchasing the said goods of the said plaintiff and paying the said freight charges, as last aforesaid, hath long since elapsed.

For that whereas, heretofore, to wit, on the 2, 3, 4, 5, 6, 11, 12, 16, 23, 25, 26, 29, and 30 days of June, 1896, and the 28th day of July, 1896, at, to wit, the town of Akron, in the county of Summit and State of Ohio, in consideration that the said plaintiff, at the special instance and request of the said defendant, would deliver to him, the said defendant, at, to wit, the said town of Akron, a certain quantity of goods, to wit, divers pieces of sewer pipe, and should prepay the freight charges on a part of the same, said defendant should purchase the same and
75 repay the said prepaid freight charges at a reasonable price, he, the said defendant, then and there undertook and faithfully promised the said plaintiff to purchase the said goods of it, and to pay to it a reasonable price therefor and to repay the said freight charges within a reasonable time then next following; and the said plaintiff in fact saith that it, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the days and years aforesaid, at the said town of Akron aforesaid, deliver to the said defendant the said quantity of goods on the terms aforesaid, and did prepay the said freight charges, and was always ready and willing to sell the said goods to and to prepay the said freight charges for the said defendant at a reasonable price,

whereof the said defendant then and there had notice; and the said plaintiff in fact saith that a reasonable time for the said defendant's purchasing the said goods of the said plaintiff and paying the freight charges, as last aforesaid, hath long since elapsed.

EDWIN WALKER,
HERBERT HAMLIN,
*Attorneys for Plaintiff.*

(Endorsed:) Filed Jan. 23, 1900. S. W. Burnham, clerk.

Afterwards, to wit, on the twenty-fourth day of January, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

76 Circuit Court of the United States, Northern District of Illinois, Northern Division.

WEDNESDAY, *January* 24, 1900.

Present: Hon. Christian C. Kohlsaat, district judge.

UNION SEWER PIPE CO. )
*vs.* ) 24362
WILLIAM E. DEE. )

Now come the parties, by their attorneys, and the court, having now heard the arguments of counsel upon said motion to strike out special matters of defense set up in notice and being fully advised in the premises, denies the same; to which ruling the plaintiff excepts, and the motion of plaintiff to strike out plea of set-off allowed; to which the defendant, by his attorney, objects and excepts, and thereupon come the following jury, to wit, L. M. Olmstead, Alex. C. Mann, Burr B. Smiley, N. E. Trumble, S. S. Guthrie, Andrew J. Reed, C. A. Vosburg, Dewitt C. Hull, James Watrous, Ed. S. Austin, Walter Walrod, and R. C. Lanning, who were all duly elected, tried, and sworn to well and truly try said issue and a true verdict give according to the law and evidence; and the evidence for plaintiff being now heard, the defendants enters his motion for leave to file an amended plea of set-off; to which the plaintiff objects and excepts, and the court, having heard the arguments of counsel upon said motion, sustains the same, and leave to file such amended plea of set-off is sustained; to which the plaintiff, by its attorney, excepts, and thereupon the evidence for the defendant is heard in part and by consent of counsel. It is ordered that this cause be tried with 24361, the same plaintiff against Thomas Connelly, and the hour for adjournment having arrived, the further trial of this cause is postponed until tomorrow morning.

77 Afterwards, to wit, on the 25th day of January, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

Circuit Court of the United States, Northern District of Illinois, Northern Division.

THURSDAY, *January* 25, 1900.

Present: Hon. Christian C. Kohlsaat, district judge.

UNION SEWER PIPE CO. vs. WILLIAM E. DEE. } 24362.

Now again come the parties, by their attorneys, and come also said jury, and the further evidence being heard when the hour for adjournment arrived the further trial is postponed until tomorrow morning.

Afterwards, to wit, on the twenty-sixth day of January, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

78 Circuit Court of the United States, Northern District of Illinois, Northern Division.

FRIDAY, *January* 26, 1900.

Present: Hon. Christian C. Kohlsaat, district judge.

UNION SEWER PIPE CO. vs. WILLIAM E. DEE. } 24362.

Now again come the parties, by their attorneys, and come also said jury; and thereupon the trial of this cause is resumed, and further evidence being heard on behalf of defendant, leave is given the defendant to amend his notice of special defenses under the plea of general issue by interlining after the words "common law" the following: "then and there in force in the State of Illinois and the common law then and there in force in the State of Ohio;" and thereupon the evidence for the plaintiff in rebuttal is heard to conclusion, and this cause is postponed until Saturday morning.

79 On the same day, to wit, the twenty-sixth day of January, 1900, came the defendant, by his attorney, and, by leave of court first had and obtained, filed in the clerk's office of said court a certain amendment to notice of special defense in words and figures following, to wit:

*Amendment to Notice of Special Defense.*

UNITED STATES OF AMERICA, }
*Northern District of Illinois,* } ss:

In the United States *District* Court of Illinois.

UNION SEWER PIPE COMPANY }
*vs.* } Gen. No., 24362.
WILLIAM E. DEE. }

Amendment to notice of special defenses. Filed after leave of court first had and obtained.

First. After the words "common law," in the sixth line of the third paragraph of the first page of said notice filed, insert the following: "then and there in force in the State of Illinois and the common law then and there in force in the State of Ohio."

Second. After the words "common law," in the first line of the second page, insert the following: "then and there in force in the State of Illinois and the common law then and there in force in the State of Ohio."

Third. After the words "common law," in the third line of the second page, insert the following: "then and there in force in the State of Illinois and the common law then and there in force in the State of Ohio."

Fourth. After the words "common law," wherever the same may appear in said notice thereafter, insert the words "above mentioned."

80 JOHN R. McFEE,
THOMAS B. LANTRY,
O'DONNELL & COUGHLAN,
*Att'ys for Def't.*

(Endorsed:) Filed Jan. 26, 1900. S. W. Burnham, clerk.

Afterwards, to wit, on the twenty-seventh day of January, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

81 Circuit Court of the United States, Northern District of Illinois, Northern Division.

SATURDAY, *January* 27, 1900.

Present: Hon. Christian C. Kohlsaat, district judge.

UNION SEWER PIPE CO. }
*vs.* } 24362.
WILLIAM E. DEE. }

Now again come the parties, by their attorneys, and the said jury having been excused from the further hearing in this cause until

Monday morning next, now comes on to be heard the motion of the plaintiff to have the jury instructed to return a verdict for the plaintiff herein, and the court, having heard the arguments of counsel on said motion and not being sufficiently advised, takes time to consider.

Afterwards, to wit, on the twenty-ninth day of January, 1900, in the December term of said court, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

82 Circuit Court of the United States, Northern District of Illinois, Northern Division.

MONDAY, *January* 29, 1900.

Present: Hon. Christian C. Kohlsaat, district judge.

UNION SEWER PIPE CO.
*vs.* } 24362.
WILLIAM E. DEE.

Now again come the parties, by their attorneys, and come also said jury; and, the court having considered and being now fully advised in the premises, it is ordered that the first and second notices of said defendant under plea of general issue be stricken out and third notice of matter of defenses under plea of general issue be also stricken out; and thereupon said jury, by direction of court, return their verdict, finding for the plaintiff, and assess its damages at the sum of two thousand three hundred eighty-nine dollars and twenty-six cents ($2,389.26), with interest; to which ruling of the court the defendant excepts and objects; thereupon the defendant enters his motion for a new trial, which is overruled; to which the defendant excepts and enters his further motion in arrest of judgment, which is heard and overruled; to which the defendant excepts; and thereupon, on motion of plaintiff for judgment on the verdict, it is considered and adjudged by the court that the plaintiff do have and recover of said defendant the said sum of two thousand three hundred eighty-nine dollars and twenty-six cents, together with the costs herein, to be taxed, and that execution issue therefor.

83 On the hearing of this cause the following exceptions were taken and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

UNION SEWER PIPE COMPANY )
*vs.*
THOMAS CONNELLY. )

*Bill of Exceptions.*

Be it remembered that on the 22nd day of January, A. D. 1900, before the Honorable Christian C. Kohlsaat, judge presiding in said court, and a jury, the above-entitled cause came on for hearing upon the pleadings heretofore filed herein.

Appearances: On behalf of plaintiff, Herbert Hamlin, Esq., and Messrs. Walker & Payne, by Mr. Walker; on behalf of defendant, Messrs. O'Donnell & Coghlan, by Mr. Coghlan, John R. McFee, Esq., and Thos. B. Lantry, Esq.

And the plaintiff, to maintain the issues upon its part, introduced the following testimony, to wit:

84 A jury was empannelled in the above-entitled cause, and the examination of the jury commenced on January 22nd, A. D. 1900, but before the completion of the examination of the jury an adjournment was taken until 10 o'clock a. m., January 23rd, 1900.

CHICAGO, ILL., *January 23rd*, 1900—10 o'clock a. m.

UNION SEWER PIPE COMPANY )
*vs.*
THOMAS CONNELLY. )

Court convened pursuant to adjournment.

Appearances: Respective counsel for the respective parties, as before.

Immediately upon the acceptance of the jury on the part of both the plaintiff and the defendant and before the jury were sworn, Mr. Walker, counsel for plaintiff, moved the court to strike from the files the notices of special defenses, on the ground that counsel for plaintiff had been served with notice by counsel for defendant that testimony in support of the following special matters of defense would be introduced on behalf of the defendant on the trial of the above-entitled cause:

First. That the plaintiff herein, The Union Sewer Pipe Company, is a combination for the purpose of controlling the manufact-
85 ure or the sale and price of sewer pipe, and that it is therefore a violation of the common-law doctrine.

Second. That the plaintiff is a monopoly organized for the purpose of controlling the manufacture and sale of sewer pipe and the transportation thereof, and that it is in violation of the Sherman anti-trust law of 1890.

Third. That the plaintiff is a combination in violation of the statutes of the State of Illinois of 1893.

Mr. WALKER: I believe that those are the only statutes referred to in the notices, first, the statute of the United States; second, the statute of the State of Illinois, and third, which is first in order, that it is contrary to the common law.

In addition to that, the defendant gives notice that he will rely upon a claim for set-off.

After argument an adjournment was taken until 10 o'clock a. m., January 24th, 1900.

CHICAGO, ILL., *January 24th*, 1900—10 o'clock a. m.

UNION SEWER PIPE COMPANY )
*vs.*
THOMAS CONNELLY. )

Court convened pursuant to adjournment.

Present: Respective counsel for the respective parties, as heretofore.

86 After full and extended argument and the citation of authorities by counsel for all parties in interest upon the foregoing questions, the court denied the motion to strike out the special matters of defense set up in the notices filed by the defendant and allowed the motion to strike out the claim for set-off.

To which ruling of the court in denying the motion to strike out the special matters of defense set up in the notices the plaintiff, by its counsel, then and there duly excepted.

To which ruling of the court in allowing the motion to strike out the claim for set-off the defendant, by his counsel, then and there duly excepted.

Which notice of set-off is in words and figures as follows, to wit:

Take further notice that on the trial of this cause the defendant will give in evidence and insist that the plaintiff was before and at the time of the commencement of this suit and still is indebted to the defendant in the sum of seventy-six thousand and five hundred and twenty dollars, for that the plaintiff is and ever since the first day of January, 1893, was a combination in the form of a trust, in restraint of trade and commerce between the States of Illinois and Ohio and between other States within the United States, and that by reason of the plaintiff being such a combination and as the direct, inevitable, and proximate result thereof the defendant has been injured in his business by reason of acts and things done by the plaintiff and for-

87 bidden and declared to be unlawful by an act of Congress of date June 2nd, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," to wit, the selling by the plaintiff while residing and carrying on business in the State of Ohio, at divers times between the 25th day of February, 1893, and the 30th day of June, 1896, of divers goods and merchandise, to wit, sewer and drainage pipes, to the defendant while residing and carrying on business in the State of Ohio, which goods and merchandise the defendant was, by force of circumstances beyond the reasonable control of the defendant, wrongfully and

designedly brought about solely by the plaintiff with intent to coerce the defendant into purchasing said goods and merchandise, compelled to obtain from and purchase of the plaintiff at prices largely in excess of the true and real market price thereof—that is to say, the defendant was compelled, as aforesaid, to pay and did pay to the plaintiff for said sewer and drainage pipes shipped between said dates by the plaintiff from the State of Ohio to the defendant in the State of Illinois the sum of $23,840.00 over and in excess of the true and real market value thereof, whereby the defendant lost and was actually damaged in his business of a sewer contractor in the sum of $23,840.00. Wherefore the defendant now claims, under and by virtue of the provisions of said act of Congress, by way of set-off against the plaintiff in this action, the said sum of $76,520.00, being three times the amount of his said actual loss and damage, together with reasonable attorneys' fees, to wit, $5,000, and his costs of suit.

88 And take further notice that the defendant will also give in evidence and insist that the plaintiff was *and* at the time of the commencement of this suit and still is indebted to the defendant in the sum of twenty-three thousand eight hundred and forty dollars ($23,840.00), damages sustained by the defendant by reason of the plaintiff becoming and since the first day of January, 1893, continuing to be and trade as a trust or combination of persons and corporations doing business in the States of Ohio and Illinois and between said States, organized for the express purpose of unlawfully and contrary to the provisions of an act of the legislature of the State of Illinois entitled "An act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void, and making certain acts and violations thereof misdemeanors, and prescribing punishment thereof and matters connected therewith.

Approved June 30th, 1893, in force July first, 1893."

And that by reason of the plaintiff being and doing business as such a trust or combination, as aforesaid, the defendant was, by force of circumstances beyond his reasonable control and which existed and were wrongfully and designedly brought about by the plaintiff with intent to coerce the defendant into purchasing only from the plaintiff, compelled to obtain from and did obtain from the plaintiff, between the 25th day of February, 1893, and the 30th day of June, 1896, large quantities of certain merchandise, to wit, sewer and drainage pipes, and was compelled and did pay

88½ therefor the sum of $126,940.00, which amount was largely in excess of the true and real market value thereof, to wit, the sum of $103,100.00.

And take further notice that the defendant will give in evidence and insist that the plaintiff was and before and at the time of the commencement of this suit and still is indebted to the defendant in the sum of twenty-three thousand eight hundred and forty dollars, money had and received by the plaintiff to the use of the defendant, in that the plaintiff became on or about the first day of January, 1893, and has ever since continued to be and operate as a trust or

combination of persons and corporations doing business in the State of Ohio and between said State and the State of Illinois, and organized and existing for the express and sole purpose of unlawfully controlling and regulating in restraint of trade and contrary to the common law the market prices of certain articles of commerce, to wit, sewer and drainage pipes.

That the defendant was compelled, wholly by reason of the existence of such trust or combination and of the pressure of circumstances beyond reasonable control of the defendant and wrongfully and designedly brought about by the plaintiff with intent to coerce the defendant into purchasing only of the plaintiff, to purchase and did purchase from the plaintiff, acting and doing business as such a trust or combination, at various dates between the 25th day of February, 1893, and the 30th day of June, 1896, large quantities
89 of said articles of commerce of the true and real market value of $103,100.00, and no more, at the unreasonable, exorbitant, fictitious, and compulsory price of $126,940.00.

And on the trial of this action the defendant will set off and allow to the plaintiff against any true and lawful demand on its part to be proved on such trial so much of the said sums of money so due from the plaintiff to the defendant, as aforesaid, as will be sufficient to satisfy and discharge such demand.

And you will further take notice that at the trial of said cause the defendant will give in evidence and insist that all and singular the matters and defenses hereinbefore specially given notice of arose out of sales of goods, wares, and merchandise made by the plaintiff to the defendant, the prices of which are sought to be recovered in this action, and that such sales were made in furtherance of and connected with the unlawful combination in the nature of a trust, as aforesaid, and that the prices charged for the said goods, wares, and merchandise so sold and the prices of other goods, wares, and merchandise sold and delivered by the plaintiff to the defendant and paid for by him were unreasonable and produced by the unlawful combination in the nature of a trust aforesaid, and that this defendant does set off the amount of such unreasonable prices so produced in excess of the actual value and reasonable prices at the time of such sales as damage to the plaintiff's demand in this action, and will ask judgment against the plaintiff
90 for such sales as damage to the plaintiff's demand in this action, and will ask judgment against the plaintiff for such excess; and

You will take further notice that the defendant will do all this in connection with all and singular the other matters of set-off of which you have heretofore been given notice.

(Signed) JOHN REID McFEE.
THOMAS B. LANTRY.
O'DONNELL & COGHLAN.

91 The court also denied defendant's leave to amend notice of set-off.

To which ruling defendant excepted.

Which amendment is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, }
*Northern District of Illinois.* }

In the United States Circuit Court Thereof.

UNION SEWER PIPE COMPANY }
*vs.* } Gen. No., 24362.
WILLIAM E. DEE. }

*Notice of Special Defense.*

To the Union Sewer Pipe Company, plaintiff in the above-entitled cause, and to Edwin Walker, Esq., and Herbert W. Hamlin, attorneys for the plaintiff:

Take notice that upon the trial of this cause the defendant will, in defense thereto, introduce in evidence and rely upon the special facts and matters hereinafter stated—that is to say:

First, That heretofore, to wit, a long period prior to the first day of January, A. D. 1893, the defendant was engaged in the business of a dealer and contractor in sewer and drainage pipe in the city of Chicago; that one of the principal features of the business of
92 the defendant was to furnish and supply a quality of sewer pipe for use by the city of Chicago, and to furnish and supply sewer pipe for use by contractors with the city of Chicago for the construction and building of main sewers; that prior and up to the first day of January, A. D. 1893, the said defendant, William E. Dee, and his predecessor in business, William M. Dee, father of the said defendant, were engaged in said business.

That prior to the first day of January, A. D. 1893, and for a period of at least five years theretofore and for a period of about five years thereafter the specifications issued by the city of Chicago for the constructions of sewers provided that Akron sewer pipe should be used.

That at such periods the commodity known as Akron sewer pipe had a trade designation and meaning and was universally understood to mean only such sewer pipe as was manufactured in Summit county, in the State of Ohio, and within a limited district of said county, known as the Akron district, and that prior to the first day of January, A. D. 1893, the said sewer pipe was manufactured exclusively by the following firms and corporations, to wit:

Buckeye Sewer Pipe Company, the Summit Sewer Pipe Company, the National Sewer Pipe Company, the Akron Sewer Pipe Company, the Hill Sewer Pipe Company, Robinson Bros. Company, the Crown Sewer Pipe Company, the Camp and Thompson Sewer Pipe Company, the Sperry Sewer Pipe Company, and the Pennsylvania Sewer Pipe Company.

That on or about the first day of January, A. D. 1893, all of the said companies enumerated confederated and combined together,

unlawfully and contrary to the common law and to the
93 general law and statutes of the *statutes of the* States of Ohio and Illinois, and contrary to the general law of the United States of America and of the law of the different States thereof, and contrary to the statutes of the United States of America, for the purpose of limiting the production of sewer pipe known as Akron sewer pipe, and of the different articles of merchandise manufactured and produced by the said firms and corporations, and for the purpose of increasing the market prices thereof, and for the purpose of preventing competition in the manufacturing, making, transportation, sale, or purchase of said articles of commerce, and for the purpose of fixing standards or figures, whereby the prices of said sewer pipe and articles of merchandise intended for sale, use, and consumption in the State of Ohio and in the State of Illinois and throughout the United States should be controlled and established.

That on or about the first day of January, A. D. 1893, the said firms and corporations hereinbefore particularly named entered into a contract with the corporation known as The Union Sewer Pipe Company, the plaintiff in this action, whereby they and each of them undertook and agreed to sell all the products of the factories of each of them through the medium of the said Union Sewer Pipe Company.

That the said Union Sewer Pipe Company, under and by virtue of such agreement, notified the said defendant that any and all sewer pipe or other merchandise theretofore manufactured
94 by any of the said firms or corporations and to be manufactured by any of the said firms and corporations could be purchased only from the said Union Sewer Pipe Company.

That by reason of the said combination and by reason of the contract between the said Union Sewer Pipe Company and all of the said firms and corporations the said firms and corporations hereinbefore mentioned undertook and agreed to sell its products only to such persons as were named and designated by the said Union Sewer Pipe Company and to fulfill only such contracts as were made, approved, or accepted by the said Union Sewer Pipe Company.

That after said combination the said Union Sewer Pipe Company alone controlled the entire manufactured product and output of all of the said firms and corporations, and it was impossible for this defendant or any other person or persons whomsoever to purchase any of the commodity known as Akron sewer pipe from the individual manufacturers or in any method other than through the medium of the said Union Sewer Pipe Company.

That after the said Union Sewer Pipe Company in this manner entered into the business aforesaid the price of Akron sewer pipe was raised beyond the reasonable and ordinary price thereof and beyond the prices theretofore prevailing, and an excessive charge for the Akron sewer pipe was thereafter made to this defendant and to others dealing in and requiring said Akron sewer pipe for the purpose of their business and over and above the fair market value thereof.

95 That at the time of the contracts and agreements between the said Union Sewer Pipe Company and the firms and corporations aforesaid the said defendant was obligated to furnish large quantities of Akron sewer pipe to his customers and to sewer contractors within the city of Chicago.

That the said defendant could not obtain any substitute for the said Akron sewer pipe, and no substitute for the same existed.

That after the said Union Sewer Pipe Company began the transaction of business it notified this defendant that he must pay the increased prices demanded, and prices unreasonable and in excess of the market value of the said sewer pipe and in excess of the prices prevailing prior thereto, or that said sewer pipe would not be furnished or supplied.

That the defendant thereupon, by force of circumstances beyond his reasonable control, and wrongfully and designedly and intentionally brought about solely by the plaintiff, was compelled to obtain the said merchandise and to pay for the same, or to agree to pay for the same, prices largely in excess of the true and real market price thereof, such prices being caused by reason — the said contracts and agreements.

That at the time of the said contracts and agreements between the said Union Sewer Pipe Company and the firms and corporations aforesaid this defendant was a party to a contract between him and the firm of Camp & Thompson, one of the firms entering into the said agreement and contract with the said Union Sewer Pipe Company, whereby the said Camp & Thompson agreed to furnish

96 and supply to this defendant three hundred and eight (308) car-loads of the said Akron sewer pipe for the supply of the customers of the said defendant in the said city of Chicago; that the said Camp and Thompson agreed to deliver the said three hundred and eight (308) car-loads in various installments, and for the purpose of carrying out specific orders and contracts requiring the said aggregate amount of three hundred and eight (308) car-loads between the said contracts, being entered into by the said defendant and various contractors within the city of Chicago, and that the requirements and needs of this defendant of the said three hundred and eight (308) car-loads for such purpose was known to the said Camp and Thompson and to the said plaintiff.

That prior to the said contracts and agreements between the said plaintiff and the said firms and corporations the said Camp and Thompson had made partial shipments under the said agreement to supply the said three hundred and eight (308) car-loads of Akron sewer pipe to this defendant.

That after the said agreements and contract between the said plaintiff and the said firms and corporations the said plaintiff, The Union Sewer Pipe Company, acquired all the rights of the said Camp and Thompson in and to the said contract, and assumed and agreed to perform all of the obligations of the said Camp and Thompson thereunder.

That the price at which the said three hundred and eight (308)

car-loads were to be delivered to this defendant was at the
97 rate of eighty per cent. (80 %) discount from the Western list price, and that this sum equalled the amount of one hundred and twenty ($120.00) dollars a car-load; that the said price of one hundred and twenty ($120.00) dollars for an average car-load of said Akron sewer pipe was the prevailing market price thereof, and was the fair and reasonable value thereof.

That as soon as the Union Sewer Pipe Company made deliveries to this defendant of portions of the said three hundred and eight (308) car-loads it demanded that this defendant pay an amount equal to seventy-five (75 %) per cent. discount from the said western price-list and aggregating an increased price of thirty ($30.00) dollars for each of the said three hundred and eight (308) car-loads of the said Akron sewer pipe remaining to be delivered.

That this defendant, by force of circumstances beyond his reasonable control, and wrongfully and designedly brought about solely by this plaintiff, was compelled to obtain the said sewer pipe and purchase the same at such prices which were largely in excess of the real market price thereof and were purchased by reason of the contract between the said Union Sewer Pipe Company and the said firms and corporations, and that this defendant does offset the amount of said increased price on the said three hundred and eight (308) car-loads and on other sewer pipe which this defendant was so forced to purchase for the exigencies of his contracts in the city of Chicago as against the plaintiff's demand in this action, and does demand judgment for the amount thereof, as particularly set out in the bill of particulars filed by this defendant in this cause.

98 And you will further take notice that this defendant will urge all of the said defense and will ask for all of the said set-offs in connection with all and singular the other matters on defenses of which you have heretofore been notified, and that this defendant does urge all of the said special matters herein stated in addition and in amendment to all and singular the other matters and things contained in the notice of special defenses and set-offs filed in this cause.

(Signed) JOHN R. McFEE,
THOS. B. LANTRY, AND
O'DONNELL & COGHLAN,
*Attorneys for Defendant.*

Received a copy of the foregoing notice this 24th day of January, A. D. 1900.

—— ——.
—— ——,
*Attorneys for Plaintiff.*

99 The jury was then sworn, the opening statements were made, and the testimony in the case was proceeded with as follows:

J. W. CHAPMAN, a witness called for the plaintiff, having been first duly sworn, testified as follows:

Direct examination by—

Mr. HAMLIN:

Q. Mr. Chapman, please state your name.
A. J. W. Chapman.
Q. Where do you live?
A. Akron.
Q. What is your business?
A. I am in the Akron post-office at the present time.

Mr. HAMLIN: I will offer these notes in evidence—the notes sued on in this suit. I guess that will do, Mr. Chapman. We won't put in any account.

No objection by defendant's counsel.

Mr. HAMLIN: The note, your honor, reads as follows—the first note: "Chicago, December 15th, 1894." The amount is $1,850.36. "Ninety days after date I promise to pay to the order of the Union Sewer Pipe Company eighteen hundred and fifty and thirty-six one-hundredths dollars at the First national bank, Chicago, Illinois, value received. Thomas Connelly." On the back is an endorsement: "June 26th, paid $148.00." Then there are some further stamps, bank stamps, appearing on the notes.

The above note is received in evidence and marked "Plaintiff's Exhibit 1, January 24th, 1900."

100 Mr. HAMLIN: The other note is dated Chicago, January, 15th, 1895, and is for $1,289.56, and reads:

"Ninety days after date I promise to pay to the order of the Union Sewer Pipe Company twelve hundred eighty-nine and fifty-six one-hundredths dollars, at the First national bank, Chicago, value received.

THOMAS CONNELLY."

On these notes also appear "no" and "due." There is no endorsement upon that note.

The above note is received in evidence and is marked "Plaintiff's Exhibit 2, January 24th, 1900."

Mr. HAMLIN: That is our case.

Mr. WALKER: If your honor please, here are two cases—one upon an account. The defense has been made, as I understand, by deposition, and by stipulation the depositions may be used in both cases. I do not know why both cases may not be submitted to this jury, and that they return separate verdicts in each case. There will be this difference in the evidence, as I understand.

It has been stated by counsel that upon the case for the other defendant there is a breach of contract relative to the Camp and Thompson pipe, and that they should pay any damages resulting from that breach of contract. From the complaint it appears that

they had to pay a higher price for the pipe purchased by Connelly from Camp and Thompson—I don't think that that is in the case, as I understand the ruling of the court this morning, so that if it is not, there is nothing in the one case that differs from the other except that the one is upon an open account, and the other is
101 upon notes. Now, if that be the fact we are willing to stipulate that the evidence should all go to the jury, and that they return separate verdicts in each case, and that if either party hereafter should want a bill of exceptions the same evidence may be used as a bill of exceptions in each case or in both cases. It would save time.

The COURT: Yes; this evidence is so elaborate that probably you can do that. The only separate questions will be the amount of the allowance.

Mr. COGHLAN: We will confer about that.

Mr. MCFEE: The record will be fixed in such shape as to show two trials, only there will be but one jury; so I think it is proper for me to make a statement as to Mr. Dee's case, and then they will finish their case for the plaintiff against both.

Mr. WALKER: Will you make a separate defense?

Mr. MCFEE: In our case we gave no notes. Our case is altogether different—somewhat different. The main defense on the question, however, is the same.

Mr. WALKER: There is no difference except the nature of the claim. One is upon an open account and the other is upon a promissory note. Of course, we can stipulate that it shall be submitted to one jury.

Mr. MCFEE: One element of our defense will be that we had an expressed contract for 308 car-loads with Camp and Thompson, and that they assumed to carry out that contract, and that after assuming to do it they refused to do so and told us that we had to
102 pay an increased price or not get the pipe.

Mr. WALKER: Did Connelly have the same kind of a contract?

Mr. MCFEE: Yes, sir.

It was here stipulated that both cases should go to the same jury, to wit, the one already empannelled, in accordance with the above suggestions made by counsel.

At this point Mr. McFee, on behalf of the defendant Dee, made his opening statement to the jury.

After counsel's opening statement as above to the jury, counsel for plaintiff proceeded as follows:

Mr. WALKER: I would like to have the counsel explain one or two matters that I do not understand in his argument to the jury. He said that it was a continuance of trust. Now, you spoke of Mr. Dee's father, who preceded the present defendant in the business. When did he die?

Mr. MCFEE: He died in 1892, the 24th of January.

Mr. WALKER: You speak of a contract with Camp and Thompson; then I apprehend the estate has nothing to do with this matter?

Mr. MCFEE: Oh, no.

Mr. WALKER: Who made the contract with Camp and Thompson? Who made it?

Mr. McFEE: William E. Dee, the defendant.

Mr. WALKER: And you say that was assumed by the plaintiff?

Mr. McFEE: I did.

Mr. WALKER: And you stated that the specifications that came from the city offices relative to the character and quality of the pipe which should be put in the sewers——

103 Mr. McFEE: Yes; we had a contract for this identical pipe.

Mr. WALKER: And these contracts you said to the jury, and the specifications of the city, you said you would bring in?

Mr. McFEE: I said that we would prove them.

Mr. WALKER: There is but one way you can prove them.

Mr. McFEE: That is a question. When we come to it, we will show it was not only a custom, but had been the fact that the city engineers specified that kind, and would not——

Mr. WALKER: We want to understand the relation between this present defendant and his father, whom he succeeded in business.

Mr. McFEE: He simply succeeded him: that is all.

Mr. WALKER: The estate has no interest in this litigation?

Mr. McFEE: None whatever.

Mr. McFEE: I offer now an amendment to the notice of special defenses.

Mr. WALKER: That we object to.

The COURT: Save the point.

Mr. COGHLAN: I would like to make the same motion for the defendant Connelly, if your honor please.

The COURT: All right. Save your point.

Mr. WALKER: Mr. McFee, do you still insist that you deny receiving the pipe?

Mr. McFEE: I would have admitted it and saved the trouble of depositions, but they were claiming that they delivered a whole lot which they did not deliver. If you simply ask us to admit what you did deliver, we will agree. We will admit that we received certain pipe.

104 Mr. WALKER: I did not know but that you would save the necessity of making proof of the fact. It is stipulated above that we agreed to submit both cases to the jury for the purpose of saving time.

Mr. McFEE: Not all of the pipe you are claiming. There are certain parts of it.

Mr. WALKER: Have you examined the bill?

Mr. McFEE: Mr. Hamlin asked me if we would admit it before we took the depositions, but he asked me to admit too much, and I came in prepared to try it.

Mr. WALKER: All right.

J. W. CHAPMAN, recalled as a witness for the plaintiff, testified in regard to the case against the defendant Dee:

Direct examination by Mr. HAMLIN:

Q. What is your name?
A. J. W. Chapman.
Q. Where do you live?
A. Akron, Ohio.
Q. What is your business?
A. I am in the Akron post-office at the present time.
Q. What was your business in the months of June and July, 1896?
A. I was book-keeper for the Union Sewer Pipe Company.
Q. What other duties, if any, did you have as such book-keeper—in that position with the Union Sewer Pipe Company?
A. None at that time.
Q. You were simply book-keeper?
A. Yes, sir.
Q. Did you have anything to do with the correspondence?
A. No, sir; keeping the accounts only.
Q. Who sent out the statements?
A. I did.
105 Q. The statements of accounts?
A. Yes, sir.

Mr. WALKER: You have not the originals of these statements, have you, Mr. McFee? I notified you to produce the originals.
Mr. MCFEE: We have some of the originals.
Mr. HAMLIN: I have copies here.
Mr. MCFEE: We have a whole lot of them, but I did not bring them over.
Mr. HAMLIN: I offer that.

Q. Will you look at that statement——

Mr. HAMLIN: I have the notice. I filed this notice.
Mr. MCFEE: We have just consolidated the cases, and I have some statements which I will produce—all that we have. I do not waive the rights to produce these statements when I go to the office.
The COURT: This takes them by surprise, of course.
Mr. HAMLIN: No objection. I want to file my notice for the production of these originals.

Q. Look at that statement and state what it is, if you know.
A. A statement of pipe purchased by Mr. Dee in June, 1896, and also a second statement, dated August 1st, 1896, is one other item prepared from that one of his shipments.
Q. State whether or not that is an exact copy of the original statement rendered.
A. As near as I can remember.
Q. What is the dates of these statements?
A. We usually date them the first of the following month in which the account is shipped.
106 Q. When where they sent?
A. Usually within a day or two after I get them.

Mr. HAMLIN: I offer these statements and ask that they be marked.

Said statements are received in evidence and marked "Plaintiff's Exhibits 3 and 4" respectively.

Which statements are in words and figures as follows:

107 PLAINTIFF'S EXHIBIT "3."

AKRON, OHIO, *July* 1, 1896.

W. E. Dee, Chicago, Ill., to the Union Sewer Pipe Co., Dr.

| | | |
|---|---|---|
| June | 2. To invoice rendered | $886.50 |
| June | 3. | 2.63 |
| | 4. | 99.36 |
| | | 99.36 |
| | | 99.36 |
| | | 71.05 |
| | | 71.05 |
| | | 71.05 |
| | | 99.36 |
| | | 99.36 |
| | | 85.75 |
| | | 99.36 |
| | | 99.36 |
| | | 97.50 |
| | 5. | 68. |
| | | 71.05 |
| | 6. | 93.69 |
| | | 63. |
| | 11. | 63. |
| | | 77.50 |
| | | 56.70 |
| | | $1,673.99 |

108 Plaintiff's Exhibit 3.

AKRON, OHIO, *July* 1, 1896.

Dee to the Union Sewer Pipe Co., Dr.

| | | |
|---|---|---|
| 1. | To balance per statement for'd | $1,673.99 |
| 12. | To invoice rendered | 56.70 |
| 16. | | 115.98 |
| | | 59.85 |
| 23. | | 54.44 |
| 25. | | 70.81 |
| 26. | | 70.75 |
| | | 70.88 |
| | | 70.88 |
| 27. | | 1.99 |
| 30. | | 93.77 |
| | | $2,340.04 |

*Monthly Statement.*

AKRON, OHIO, *Aug.* 1, 1896.

W. E. Dee to the Union Sewer Pipe Co., Dr.

| | | |
|---|---|---|
| 7. 1. | To balance per statement rendered..... | $2,340.04 |
| | To invoice rendered..... ..... | |
| 7. 27. | Prepaid freight..... | 49.22 |
| | | $2,389.26 |

"Plaintiff's Exhibit 4."

109 Mr. McFEE: I have talked with Mr. Dee and we will admit the receipt of the goods.

The COURT: How much?

Mr. McFEE: The whole amount of the claim, $2,389.26.

Mr. HAMLIN: That is our case.

* * * * * * *

110 Mr. WALKER: Before reading that I think it would be best, in order to preserve our objections and our exceptions in the record, to object to the reading of these depositions. At all events, it can do no harm. I do not wish to discuss the matter at all, but I object to the evidence of the witness David E. Hill, if that is his name, for the reason that the evidence of the witness is not admissible under the general issue or under the notice of special defenses, and that the entire evidence of the witness is irrelevant as well as inadmissible, and we move to reject the evidence and move that the deposition of this witness be suppressed.

The COURT: Until I know something about what his testi-
111 mony is, I am hardly in a position to dispose of the motion.

Mr. McFEE: You couldn't know that until we read it.

The COURT: The objection to the whole evidence must be overruled. You can raise it on any questions or particular matters. That is a different thing. Save the objection to the testimony.

Mr. WALKER: Yes, sir.

* * * * * * *

112 DAVID E. HILL, being first duly sworn by me as a witness to the said cause previous to the commencement of his examination to testify the truth as well on the part of the plaintiff as the defendant in relation to the matters in controversy between the said plaintiff and defendant so far as he should be interrogated, being introduced on behalf of the defendant, Thomas Connelly, and examined by Mr. J. E. Deakin, testified and deposed as follows:

(All questions to follow which have any bearing on the question as to whether the Union Sewer Pipe Company has infringed any statute or Federal law prohibiting illegal combinations or trusts or has violated the common law prohibiting such combinations and all documentary evidence relating to the same are objected to by the plaintiff on the ground that this issue is not an issue in the case and is wholly irrelevant, incompetent, and immaterial.)

Q. Will you please state your name and residence?

A. David E. Hill; Akron, Ohio.

Q. What is your occupation?

A. Manufacturer of sewer pipe.

Q. How long have you been in that business or connected with that business?

A. Forty years.

Q. In what location?

A. Akron.

Q. Are you familiar with the details of the sewer-pipe business in and about the Akron district during the past ten years, say?

A. Well, yes.

Q. And familiar with the different firms, companies, and persons manufacturing and dealing in pipe?

A. Yes, sir.

113 Q. What is meant by standard Akron pipe in the trade?

A. We manufacture different thicknesses. The standard refers to the thickness of the pipe—standard thickness.

Q. Please state a little more particularly what is understood in the trade in this district and throughout the country by the term standard pipe—that is, what dealers and others understand by that term.

A. I haven't used the term so much myself. The term standard pipe really refers to the thickness of the pipe. Now, some factories here in Akron have adopted the name of standard Akron sewer pipe with an idea that they had a better grade of pipe than some others.

Q. What firm or makers have adopted that term, if you know?

A. The Akron Sewer Pipe Company.

Q. I will show you for the purpose of assisting your memory a document which has already been shown to Mr. Robinson, the witness preceding you, and which has been marked for identification "Exhibit 1," and ask you if, having looked at that document, it assists you in naming the companies or firms that have made and dealt in what is known as standard Akron pipe. (Witness reads document marked for identification "Exhibit 1.") And, having looked at that document, will you state more particularly what is understood and meant throughout the trade by the term standard Akron pipe, and what companies, firms, or persons were making and dealing in standard Akron pipe during the years 1893 to 1896.

A. All these companies made certain pipe known as standard pipe.

114 Q. That is, all the companies named at the foot of that document?

A. Yes, sir; all the companies but two.

Q. Which two?

A. The Pennsylvania Sewer Pipe Company and the Crown Fire Clay Company. They made standard pipe, but they never pretended to make standard Akron pipe.

Q. What companies not mentioned here or firms or persons made

what is understood to be standard Akron pipe during the years 1893 to 1896, inclusive?

(Question objected to by plaintiff on the ground that it is immaterial.)

A. Those were all the Akron companies.

Q. There were no other companies, then, that are not mentioned there that made what is known as Akron standard pipe; is that the case?

A. Yes, sir; they all made what is known as standard pipe. Those two companies made standard pipe, but not what is known as standard Akron pipe.

Q. What other companies besides those two made what is known as standard pipe?

A. There were 75 or 80 others all over the country.

Q. But they would be making an entirely different kind of pipe?

A. No, sir; not in thickness.

Q. But in quality it is different?

A. They all claim they make good pipe, and they do make it.

Q. It has been admitted, Mr. Hill, in this case that you were an original subscriber for four shares of stock in the Union Sewer Pipe Company upon its organization, and that you subsequently transferred two of those shares to Charles Baird for Chapman; that is an admitted fact in the case. Will you now state the circumstances preceding your subscription to that capital stock and the circumstances under which you made your subscription and the purposes for which you made that subscription.

115–139

(Specially objected to on the ground that it is incompetent.)

A. I thought it was the interest of all concerned to subscribe.

Q. Do you mean by all concerned the manufacturers and dealers?

A. Yes, sir.

Q. In what way was it to their interest?

A. It was to the interest of the manufacturers because they saved money by the association.

Q. Do you mean that they could get better prices?

A. No, sir; I mean that they did not get better prices; I mean that their expenses were far less combined than they were separate. When these shops were separate they had to send out as many as fourteen traveling men, while when they were combined they sent out only half that many; and furthermore it took less book-keeping and saved in office expenses.

Q. You were at the time of the organization of the Union Sewer Pipe Company connected with the Hill Sewer Pipe Company, were you not?

A. Yes, sir.

Q. What position did you hold?

A. I was president of it.

Q. And were you also connected with the Akron Sewer Pipe Company?

A. Yes, sir.

Q. What position did you hold in that company?

A. I was president.

Q. What, if any, connection did you have with the Pennsylvania Sewer Pipe Company?

—. ——.

140 * * * * * * *

Q. Shortly after the formation of the Union Sewer Pipe Company do you remember of going to Chicago and having an interview at the Tremont house with Mr. Connelly, the defendant, Mr. Williams, and Mr. Evans?

A. I don't remember any particular time that I was there at the Tremont house.

Q. Don't you remember of going to them and at the place I mentioned telling them that you manufacturers down here had formed a pool to control the output of sewer pipe and to limit the sales?

A. I never told them any such thing as that.

Q. And that you were trying to make some money out of the sewer-pipe business, and that you would give them a part of it?

A. No, sir.

Q. Nothing was told like that?

A. No, sir; I never told them anything about limiting sales; I don't remember anything about that. You seem to have a special time fixed in your mind.

141 & 142 Q. I am speaking shortly after the formation of this company at the Tremont house, in Chicago.

A. No. I know we have had an association for years before the union was formed, and we used to have frequent meetings at the Tremont house.

Mr. BAIRD: Who do you mean by that?

WITNESS: I mean the Jackson, Michigan, Fire Clay Company, the Columbia Sewer Pipe Company, not the Union Sewer Pipe Company. Before you put another question, I say I never met them. I do not wish to be understood as saying that I did not meet them, because I have known them at the time—at the time that you mentioned.

Q. You have no recollection of any such interview?

A. I know there was nothing of that kind said to any of them by me.

* * * * * * *

143 Q. You are an expert, are you not?

(Question objected to by defendant as a decided conclusion.)

A. No. I should answer that in the negative.

Q. You are as familiar as manufacturers of your line of business are—you have had some experiences of your own?

(Question objected to by defendant as a conclusion.)

A. I have been familiar with the business for forty years. I am the oldest manufacturer in the United States. I never set myself up as an expert or as knowing any more about the business than a number of others; but I believe I know as much.

(Answer objected to by defendant as irresponsive to the question.)

Q. During this period of which you have spoken were not numerous other manufacturers who were competent, and as a matter of fact did, compete with you in the sewer-pipe market comprising the State of Illinois and the city of Chicago?

(Objected to by defendant as immaterial.)

A. Yes, sir.

Q. State whether or not, Mr. Hill, you had numerous other competitors in that district.

A. Oh, yes; we did not have so very many competitors because they could not compete with us.

Q. Will you state what other companies there were by name, as near as you can remember, competing with you in that market—that is to say, in the State of Illinois?

(Objected to by defendant, unless it is exactly the same kind and grade of pipe.)

A. I don't know as I can mention the names of all of them.

Q. Will you name what ones occur to you?

A. The facts are that some of the companies that competed with us for the Chicago market were not all located in Illinois.

144 There were three companies in St. Louis; two companies at Red Wing, Minnesota, whose names I never knew. I have forgotten the companies that competed with us. There were two companies in Michigan, the Jackson Fire Clay Company and the Bennet Sewer Pipe Company, that competed with us, and there were a number of Ohio River companies—the Knowles, Taylor, and Anderson Company and the Calumet Fire Clay Company and the Great Western Sewer Pipe Company. Then there was the Royal and the Diamond, of Urichsville, and the Eurichsville Fire Clay Company.

Q. Any others?

A. I could pick up a dozen or more in time.

Q. How did the size of these companies compare with the size of the companies in the locality of Akron?

A. They compared favorably. One of them was the second largest company in the United States.

Q. Will you state whether as a class they were larger companies upon the average?

(Question objected to by defendant.)

A. I don't think there was much difference.

Q. State whether or not it is true that with the exception of the National Sewer Pipe Company some of these companies were considered larger than the companies in this locality.

(Question objected to by defendant.)

A. At that time, no.

Q. Were they as large?

(Objected to by defendant.)

A. O yes; they were about the same.

Q. Will you kindly name, without attempting to give the number, such companies as occur to you which competed with you in the general sewer-pipe market in the State of Illinois?

(Question objected to as immaterial, irrelevant, and incompetent.)

145–147 A. I guess there were 40 of them that competed in our trade that was in Illinois.

Q. You speak of standard pipe; will you kindly explain what is generally meant by the term standard pipe?

A. Standard pipe, as I have already testified, refers more particularly to the thickness of the pipe. The standard pipe depends entirely upon the thickness of the pipe and not upon the quality of it.

Q. Is this term a general term in general use throughout the country?

A. I think it is.

Q. Will you kindly explain what is meant when pipe is spoken of as Standard Akron pipe?

A. Why, it means precisely what it says. It is a pipe manufactured in or near Akron, of the standard thickness and depth of socket.

* * * * * * *

148 Q. Will you explain why it was that the subscriptions to the capital stock of the Union Sewer Pipe Company did not aggregate a larger amount than they did?

(Objected to as immaterial.)

A. Because we didn't need any more.

Q. What were the reasons for not requiring a large subscription to the capital stock?

A. We were not manufacturing; we were buying; and we bought on terms and sold on terms by which we could pay for the pipe out of the receipts. We did not need any money.

Q. That is to say, those companies which you have enumerated and the other competing companies, which you do not now recollect, were they or were they not entirely independent of the Union Sewer Pipe Company?

A. Yes, sir; they were.

Q. They had no agreement or connection with them?

A. No.

Q. Did they regulate their own prices?

A. They did.

(Defendant here makes a general objection on the ground that the examination is not proper cross-examination.)

Q. Subject to no control?

A. No control whatever by us.

Q. Then it is a fact that they were at liberty to sell their pipe in the Illinois market at a lower or higher price than the Union Company's, if they so desired?

A. Yes, sir.

Q. As a matter of fact, how did their prices compare with the Union Company's prices?

(Objected to as immaterial.)

A. We thought at the time that they were generally lower.

Q. What do you think now?

A. I think so still. They all sold as low as they possibly could.

Q. Is it not a fact that some of these companies were kept
149 out of the Illinois market by reason of the fact that they could not meet the Union Company's prices?

(Objected — as immaterial.)

A. It is a fact that they were kept out of some of the markets of Illinois because they did not meet our prices.

Q. Do you believe that the reason for not meeting those prices were that those prices were too low?

A. Yes, sir.

Q. Upon what do you base your answer?

A. I base it upon my knowledge of the fact that they undersold us; we undersold them in some cases.

Q. That is to say that their prices in certain cases were higher than those of the Union Company's?

A. Yes, sir.

Q. But what effect, if any, did the organization of the Union Sewer Pipe Company have upon the prices of pipe, and of such pipe as was bought by the defendants in this case, in the Central and Western States generally?

(Objected to as immaterial.)

A. I do not think it would have a very great effect one way or the other. It had this affect, that in the markets it in a measure regulated or allowed the dealers to regulate their prices.

Q. What dealers?

A. The dealers in Chicago.

Q. What dealers in particular?

A. Well, Williams, Dee, and Connelly.

Q. Were they the principal dealers there?

A. Yes, sir.

Q. They are the defendants in this case?

A. Yes, sir.

Q. With regard to the delivery of sewer pipe to these defend-
ants, Dee and Connelly, will you state what were the terms
150 of delivery—that is to say, where was the pipe to be delivered, under the terms of your contract with them?

(Objected to as immaterial, not proper cross-examination. We

have not made Mr. Hill a witness at all as to any special contract of dealers with the Union.)

A. It was made in Akron.

Q. Does that apply to all pipe purchased by them?

A. Yes, sir.

Q. At what place in Akron was that delivery made?

A. At any of our factories; at the nearest railroad depot.

Q. Do you mean on board cars?

A. Yes, sir.

Q. Then you made no deliveries to Dee or Connelly within the State of Illinois?

A. We delivered nothing in Chicago except to the agencies. Williams was our agent, the agent of the Union Sewer Pipe Company.

Q. When did that agency terminate?

(Objected to by defendant.)

A. About the first of January, 1895, I think.

Q. After that period at which this agency was terminated, where were deliveries made to Williams on contracts made after that time with him?

(Objected to by defendant.)

A. On board cars in Akron.

Q. Under the terms of this contract with William E. Dee was the margin allowed by that contract of ten per cent. between the prices at which you agreed to sell and the prices at which he agreed to sell a fair profit, as prices of pipe go?

(Objected to as immaterial and not proper cross-examination.)

A. Why, yes.

151 Q. From your knowledge of prices received by dealers in sewer pipe of the description covered by this contract with Dee, what would you say was the comparison between those prices and such prices received during the three years from January 1st, 1893, to the middle of 1896 by other dealers generally in the Illinois market?

(Objected to by defendant.)

A. If they sold at the prices agreed upon by the association in Chicago, it was way above it. They made more money than any other dealers in the United States—that is, I say, if they carried out the agreement with each other.

(Objected to as irresponsive.)

Q. How would such profits as specified in your contracts compare with profits received by dealers since July 1st, 1896?

(Objected to by defendant.)

A. I have no means of knowing exactly. I am not selling in the Chicago market myself, because they have cut the prices down so low that I can't get there. They are not making anything.

Q. Does Dee or does Connelly claim that?

(Objected to by defendant.)

A. I don't know as I ought to answer that question. Of course I have seen Mr. Connelly and I have talked with him, and I know pretty near his opinion.

Q. What has Mr. Connelly said to you on the subject?

(Objected to by defendant.)

A. He told me that there is no money in the business at all now.

Q. Since July 1st, 1896, has Mr. Connelly ever said to you that he would be glad to see the continuation of the business of the
152 Union Sewer Pipe Company?

A. Yes, sir.

Q. At what time has he said that?

(Objected to by defendant.)

A. Some time in 1897.

Q. Did he ever say this to you in 1896—after July 1st?

A. Well, I can't recollect that.

Q. How does this margin specified in this contract compare with the margin of profit made by dealers in the Illinois market previous to the time that the contract with Dee was entered into?

A. It was entirely different then. The bulk of sewer pipe was sold in the Chicago market before Dee entered into business. The bulk of the business was in the hands of Williams, the father of the present Williams. I can't answer that question.

Q. As near as you can state, how would it compare?

A. Why, I should say that they were making as much money with the Union Sewer Pipe Company as they ever made out of sewer pipe; that is my opinion.

Q. Do you mean by this under the agreement with William E. Dee?

A. Yes, sir.

Q. Did you ever have any conversation with William E. Dee?

A. Oh, yes.

Q. Upon this subject-matter of which we have spoken?

A. No; I never talked very much with Dee on that subject. I talked with Mr. Connelly.

Q. In these conversations with Connelly did he state, or did he not, that the organization of the Union Sewer Pipe Company had a beneficial effect upon his business?

A. He did.

Q. Did he ever state what effect a discontinuance of this *of this* company had upon his business?

A. He said it was disastrous.

Q. Did he ever state what its effect was upon the business
153 of dealers in the State of Illinois generally?

A. I don't know; I don't recollect that. He would rather have a fixed price all over the United States. All the dealers would prefer a fixed price, if they know they are getting bottom prices.

So far as my talk with Dee is concerned, I don't think I ever had any talk about that outside of Chicago.

Q. You may state whether the organization of the Union Sewer Pipe Company had the effect of economy and expense of operation of the various companies in Akron with which they had contracts.

A. That was the chief object in forming the Union Sewer Pipe Company, as I understood it at the time.

Q. Were there any other objects for which the Union was formed besides the saving of expense?

A. The saving of expense was the chief object, so far as I was informed.

Q. In what respect was that expense lessened?

A. We saved a dozen or fifteen traveling men; at least a dozen traveling men were saved. Then we also saved in our office expenses.

Q. Do you mean your own individual company?

A. No; I mean the Union Sewer Pipe Company.

Q. Was there any saving in the matter of freight charges?

A. Why, yes.

Q. How great was that saving?

A. O, I would not undertake to estimate it; it was large. It amounted up into the thousands.

Q. It was a material saving, was it?

A. Yes, sir.

Q. Was there any saving in the ability to fill orders more promptly?

A. Why, no; no actual saving. I didn't look at it in that light. It unquestionably got us a great deal of business that we could not have got individually.

154 Q. Then there was a saving in getting business?

A. Yes, sir.

Q. Were the prices put upon sewer pipe—generally in the Illinois market, competing with the Union Sewer Pipe Company—fixed by these companies themselves or by some other parties?

A. They were fixed by themselves, I suppose. Indeed, I can't tell as to that.

Q. Did the Union Sewer Pipe Company have any hand in regulating or fixing those prices?

(Question objected to by defendant.)

A. No.

Q. Then there is no reason, is there, so far as you know, why prices placed upon pipe sold in the Illinois market by these competing companies should not have varied both above and below the Union Sewer Company's prices?

A. I do not know any reason why they should not. We kept our prices low.

Q. Assuming that the contention of the defendants in this case that the Union Sewer Pipe Company was able to regulate, influence, or fix prices upon sewer pipe in the Illinois markets to be true, what

affect would such an influence have upon the profits made by the defendants Dee and Connelly in the State of Illinois?

A. It would not have any.

Q. Would you say the profits would be greater or less?

A. They would be greater.

Q. Would it or would it not enable them to sell their pipe at a higher price?

A. Do you suppose, in the first place, that the Union Sewer Pipe Company has the power to fix prices?

Q. Yes.

A. Why, certainly it would.

Q. Then you say it would have been beneficial to them.

A. Certainly.

155 Q. Supposing that such a control were exercised, will you explain in what respect it would benefit them?

A. If the Union Sewer Pipe Company could have controlled prices in Chicago they could have controlled it in such a way as to have their special laws and make more out of it if they wanted to. They could have cut off smaller dealers entirely, and unquestionably they could have controlled the prices.

Q. Then, do you mean to say that if it were a fact that prices were controlled by you in that locality they would in turn have been able to control prices at which products were sold?

A. Yes, sir; and they would have sold a great deal more.

Q. But, as a matter of fact, do you mean to say that such a control was not exercised by the Union Sewer Pipe Company?

A. Certainly not; they had not the power to do it.

Q. During the period from about January 1st, 1893, up to July 1st, 1896, was there ever any understanding of any sort between the local dealers, including Dee and Connelly, in the city of Chicago as to prices to be put upon pipe sold by them?

(Objected to by defendant.)

A. I was told that there was an understanding—that they had an agreement between themselves.

(Answer objected to by defendant as hearsay.)

Q. Was such an agreement ever spoken about to you by Dee or Connelly?

A. Yes, sir; and by Mr. Williams.

Q. Did they admit that such an agreement existed?

A. Certainly.

Q. Did they admit that they were parties to that agreement?

A. Certainly.

Q. Did they ever state to you what the effect of that agreement was upon the profits derived by them in the sale of sewer pipe in Illinois?

156 A. I do not know that they ever stated anything in reference to that.

Q. Did they ever state that the agreement was beneficial?

A. Yes, sir.

Q. What part did Dee or Connelly take in this agreement? Was it a prominent part?

A. Not any more prominent than Williams', I think.

Q. Was it as much so?

A. O, yes.

Q. How many dealers were in this agreement?

A. I can't tell you.

Q. Were they the bulk of the Chicago dealers?

A. I think they were the majority of the dealers.

Q. Will you state what was the cause of the cessation of business on the part of the Union Sewer Pipe Company?

A. There are differences of opinion.

Q. Was it due to the fact that the prices received by the Union Sewer Pipe Company became less than the prices which they were obligated under their contracts with their Akron companies to pay?

A. That is a fact, I think.

Q. Was this one of the reasons, or was it not, for the cessation of operation of the Union Sewer Pipe Company?

A. I think so.

Q. Is it true that the preliminary hearing had before the Attorney General about March, 1896, was the cause of the cessation of business on the part of the Union Sewer Pipe Company?

A. No.

Q. How long, if you know, did the Union Sewer Pipe Company continue to carry on business after that hearing?

A. Last July, 1896. It carried on business about four months.

Q. How many competitors, as near as you can judge, did the Union Sewer Pipe Company have in the United States?

157–176 A. About ninety.

Q. Will you state whether or not the Union Sewer Pipe Company had to compete with a large number in the State of Illinois or not?

A. Yes, sir; they did. They had to compete with all the manufacturers in the State of Illinois.

Q. And some outside of the State of Illinois, did they?

A. Certainly.

Q. What was the result of this fact that competition existed as to the control or exercise by the Union Company to control prices of pipe in Illinois?

A. During the lifetime of the company, you mean? I don't think it had very bad results.

Q. Then you mean to say that you could not control prices?

A. O, no: we never controlled prices anywhere.

177 & 178 Recross-examination by HERBERT HAMLIN:

Q. Is it not true that previous to the purchase of the Sperry factory by the Union Sewer Pipe Company that factory had been closed down for a considerable period?

A. Yes, sir; it was.

Q. For how long, do you remember?

A. No; I can't tell you.

Q. Was it for a couple of years?

A. I don't believe it was as long as that; it was some little time; in the neighborhood of a year, I should judge. There is a possibility that I may be mistaken about that, but it was closed down for some time.

Q. Did not the officers of the Union Company have in mind the possibility of opening that factory for manufacturing sewer pipe in some future time?

A. Why, they had in mind that if they needed it it was already to run. They could use it just as well as any other factory.

Q. What led to the purchase of this factory?

A. It was put up for sale, and the Union Sewer Pipe Company thought it was best to bid on it.

Q. Was it bought at a good figure?

A. That is hard to tell; it was bought way down below the cost, of course.

Q. The cost of what?

A. The cost of the factory—the original cost.

Q. Now, you speak of companies in the Union. Do you mean by that expression the contractual relations existing between the individual companies in and about Akron and the Union Sewer Pipe Company?

A. That was all.

Q. These individual companies formed no part of the Union Sewer Pipe Company?

A. No, sir.

179–188 Q. They varied in the way that prices were accustomed to vary, did they?

A. They varied somewhat in the different markets.

Q. In the way that prices generally do vary?

A. Yes, sir.

Q. Which way did they vary?

A. Both ways—up and down.

Q. That is to say, the prices existing during the continuation of the business of the Union Sewer Pipe Company were not increased owing to the formation of this company?

(Objected to by defendant as stating what the witness has not stated.)

A. Well, in some cases they may have been increased a trifle; in other cases decreased. We tried to keep our prices uniform in the different districts that we dealt in.

Q. That is, the Union Sewer Pipe Company attempted to keep its own prices as regular as possible?

A. Yes, sir; the tendency was all the time down.

Q. Is that or is that not the practice of most sewer-pipe companies of any description?

A. I guess it is the practice of all companies.

Q. That they seek to keep their prices as steadily as possible?

A. Certainly.

Q. It is the practice of sewer-pipe manufacturers generally, is it not?

A. Yes, sir.

Q. In other words, nobody cares to sell at a loss?

A. No; I don't think they do.

Q. And for that reason every manufacturer of sewer pipe desires a steadiness in the market?

A. Certainly.

Q. You have spoken about the sources of the funds which went towards the purchase of the Sperry plant. Is it not true that those funds were funds of the Union Sewer Pipe Company?

A. Why, I supposed, as a matter of course, that it was.

189–201 Recross-examination by HERBERT HAMLIN:

Q. Now, Mr. Hill, in regard to this card or list price arrangement that is a matter, is it not, which has no influence whatever upon the price of pipe?

A. None at all. It is a card made years ago by an agreement among the manufacturers, and they have all kept the same card and worked by the same card and discounted from that card. It was not got up here in Akron.

Q. It was used, was it not, as a matter of convenience?

A. Yes, sir.

Q. For convenience in quoting prices?

A. Yes, sir; all dealers know of the card.

Q. Is not this card arrangement one common to nearly every species of manufacture?

A. I think so.

Q. Is it not true of iron manufacturers that they have a card of this class?

(Question objected to by defendant as having no connection whatever with the Union Sewer Pipe Company.)

A. Yes, sir.

Q. The Union Sewer Pipe Company never changed the card at all?

A. I think I am right in that.

Q. In answer to Mr. Deakin's question you stated, I believe, did you not, that the competition among Akron companies previously to the formation of the Union Sewer Pipe Company was not limited to this Akron locality, but was a very general one extending frequently into the Western States.

A. Yes, sir; I think I stated that competition was not as close between us as it was between the Akron men and outside.

Q. Never has been as close?

A. No, sir; certainly not closer.

Further examination of witness continued for production of contracts, the copy of drafted contract and western card, as promised.

202 HORACE B. CAMP, being first duly sworn by me as a witness to the said cause previous to the commencement of his examination to testify the truth as well on the part of the plaintiff as the defendant in relation to the matters in controversy between the said plaintiff and defendant so far as he should be interrogated, being introduced on behalf of the defendant, Thomas Connelly, and examined by Mr. J. E. Deakin, testified and deposed as follows:

(All questions to follow which have any bearing upon the question as to whether the Union Sewer Pipe Company has infringed any statute or Federal law prohibiting illegal combinations or trusts or has violated the common law prohibiting such combinations and all documentary evidence relating to the same are objected to by the plaintiff on the ground that this issue is not an issue in the case and is wholly irrelevant, incompetent, and immaterial.)

Q. Please state your name.
A. Horace B. Camp.
Q. Where do you live?
A. Akron, Ohio.
Q. What is your occupation?
A. Manufacturer of clay products.
Q. What is known as Akron sewer pipe?
A. I make very little sewer pipe now-days.
Q. You used to, did you not?
A. I used to.
Q. Previously to 1893 what has been your business?
A. Manufacturer of sewer pipe.
Q. Of Akron sewer pipe?
A. Yes, sir.
Q. In Akron?
A. In Cuyahoga Falls.
Q. How near is that to Akron?
A. About five miles.
Q. In what is known as the Akron district?
A. Yes, sir.
Q. How many years were you in that business or connected with it?
A. I started in 1865.
203 Q. What was the name of your firm?
A. Camp & Thomoson.
Q. Who were the members of that firm?
A. Harry Thompson and myself.
Q. Those were the only members of the firm?
A. Yes, sir.
Q. That was in the fall of 1893 and the spring of 1893, was it?
A. We dissolved in the spring of 1893.
Q. When?
A. In April.
Q. You then went out and Mr. Harry Thompson succeeded in the business?
A. Yes, sir.

Q. What do you mean by the Akron district in connection with the sewer-pipe business?

A. It has reference to the manufacturers of this location, as I understand it.

Q. Is not the Akron district a term well known to the trade in sewer pipe throughout the country?

A. Yes, sir.

Q. And in the spring of 1893 the corporations or firms making sewer pipe in the Akron district were the Akron Sewer Pipe Company, the Buckeye Sewer Pipe Company, your firm, the Camp and Thompson Sewer Pipe Company, the Crown Fire Clay Company, the Hill Sewer Pipe Company, the National Sewer Pipe Company, Robinson Bros. & Company, the Summit Sewer Pipe Company, and the Sperry Sewer Pipe Company. Were those not the corporations or firms manufacturing what is known as standard Akron pipe in the Akron district in the commencement of 1893?

A. I think there were no others.

Q. Or if there were any others they must have been very small and unimportant concerns, were they not?

A. Yes, sir.

Q. At the time of which we are speaking, the spring of 1893, what would be the capacity of those various corporations or firms?

A. They usually rated about eight thousand car-loads.

204 Q. That is the aggregate capacity?

A. Yes, sir. I was later connected with the Central Company. They tried to come together and they based their figure on eight thousand cars for the Akron district and two thousand for the River district. That is where I got my estimate.

Q. With regard to prices prevailing immediately prior to the organization of the Union Sewer Pipe Company, what would be the value of that output, approximately?

A. I suppose about $75.00 a car-load. That is only a rough estimate, because they vary so. You cannot get as many dollars' worth of large pipe in a car, and small pipe counts up pretty well.

Q. Where was that pipe chiefly sold?

A. All over the country in the Eastern and Western States.

Q. How did the sewer pipe manufactured in the Akron district compare with other sewer pipes in the markets in quality?

A. That is a matter of difference. In some locations they would not take anything but River pipe and in others nothing but Akron pipe.

Q. But you know how the standing of that pipe was in the Chicago and Illinois market during 1893?

A. Yes, sir.

Q. As a general thing they preferred Akron pipe?

A. Yes, sir.

Q. Was it a fact during the beginning of 1893, or about that time, that engineers in charge of village and city sewer works and similar works in and near Chicago generally specified Akron pipe?

A. Why, it was often done, but not always.

Q. It is not a general rule to call for Akron pipe in their specifi cations?

205 A. No; I think not. Up to the formation of the Union I was by myself, and they made a great fuss that we advertised as having Akron pipe; they tried to have it thrown out because it wasn't Akron pipe.

Q. How far was that from here?

A. Five miles.

Mr. ROGERS: Made out of the same clay?

WITNESS: No.

Mr. DEAKIN:

Q. You found it was advertised in the market wherever it was made to sell as Akron pipe?

A. No, sir; that was locally.

Q. I am speaking of the Chicago market.

A. It was advertised there; yes, sir.

Q. You remember the formation of the Union, do you not, Mr. Camp?

A. Yes, sir.

Q. It is a fact that your firm at first were indisposed to come into the Union, is it not?

A. I don't remember the fact.

Q. You did come into the Union?

A. Yes, sir.

Q. These other corporations and firms whose names I have mentioned all went into the Union together, did they?

A. Yes, sir.

Q. Is it not a fact that you gentlemen representing these different corporations and firms agreed among yourselves previously to the incorporation of the Union Sewer Pipe Company as a corporation that you would pool your interest and work through that Union?

(Objected to by plaintiff.)

A. That is what our companies contracted to do.

Q. What do you mean by pooling your interests and working through the Union? Please explain the operation of the Union.

(Objected to as an assumption that Mr. Camp stated that they pooled their interests.)

206 A. I did not testify that we pooled our interests. Camp & Thompson made a good many things besides sewer pipe. I had general management of sales and manufacturing. I was anxious to get rid of this close fighting in the sale of sewer pipe, and this was the object in making this contract with the Union—to get rid of some of the expense of selling sewer pipe. We largely manufactured other goods that required more attention. We simply contracted part of our business, on which they was to place certain prices.

Q. Then you did not pool your interest as to other lines of manufacture, but only as to the pipe?

(Specially objected to as assuming that the witness testified that his interests were pooled.)

A. Pipe only.

Q. That was true of the other pipe manufacturers, was it not, who were also manufacturing other articles?

(Question objected to as hearsay.)

A. I think not.

Q. Did they pool their interests in other branches of manufacture as well as pipe—some of them?

A. They made nothing but sewer pipe—other manufacturers.

Q. Each of your companies and each of those companies and firms whose names have been mentioned entered into a special contract with the Union Sewer Pipe Company as to the Union Sewer Pipe Company taking and handling their output of sewer pipe, did they not?

(Question objected to as hearsay.)

A. Yes, sir.

Q. Your firm was simply confined to the product of pipe?

A. Yes, sir.

Q. Will you state, generally, the nature of the contract between your firm and the Union Sewer Pipe Company?

A. Mr. Thompson attended to that. I had nothing to do with it.

207 Q. Will you state generally the nature of that contract, so far as you can recollect?

(Objected to as hearsay.)

A. They were to take the pipe and give us a price for it.

Q. How was that price determined or arrived at?

(Objected to as hearsay.)

A. They used the price-list as a basis and paid a certain percentage of that list.

Q. The percentage that was estimated would just about cover the actual cost of the pipe-producers?

(Objected to by plaintiff.)

A. I think not.

Q. What was it based on?

A. It was based low enough, so that it was estimated there would be no loss with the Union Company, and if there was a profit it was to be divided *pro rata*.

Q. Among the different companies that were in the pool?

A. Yes, sir.

Q. That was the general scope and method of work, was it—of this trust from its commencement or as long as you were in it?

(Objected to by plaintiff.)

A. I left it so soon that it hardly came into working order; in the winter there is no business.

Q. You subscribed for four shares, I believe, in the Union Sewer Pipe Company?

A. I did.

Q. Did you do that individually or was it Camp & Thompson who made the subscriptions?

A. Individually.

Q. You were in the Union Sewer Pipe Company as representing the firm of Camp & Thompson and looked after their interests; that was the reason why you took stock in the Union Sewer Pipe Company, was it not?

A. I suppose it was.

208 Q. You did not expect to get dividends or profits as a stockholder from the Union Sewer Pipe Company?

A. I expected it would benefit Camp & Thompson's business.

Q. And was not the Union Sewer Pipe Company brought about by reason of the keen competition between the Akron makers, and some of them sold lower than others were willing to sell and somewhat demoralized your Akron market?

A. There was a very bitter feeling between the manufacturers in Akron.

Q. Some of them were underselling others, were they not?

A. There didn't anybody admit that. That was the feeling among some of them.

Q. The object of the Union, then, Mr. Camp, was to avoid the somewhat disastrous effects of open competition between the Akron firms, was it not?

(Objected to by plaintiff as leading.)

A. I don't know what the objects of the other members were. I had a different object, perhaps, from the rest of them.

Q. What do you mean by pooling your interests?

(Objected to by plaintiff as an assumption.)

A. I don't believe I used that term.

Q. You have admitted that the various manufacturers of pipe did, through the Union, pool their interests, have you not?

(Question objected to by plaintiff as leading.)

A. (No answer.)

Q. You are familiar, of course, with the western card, are you not?

A. Yes, sir.

Q. That means the list of what you call the gross price of pipe in the western market, in Chicago and Illinois, does it not?

A. No more so than Ohio, Indiana, and Michigan.

209 Q. Of all that district?

A. Yes, sir.

Q. Then the prices of sewer pipe actually paid by purchasers was

determined by the amount of discount taken off that Western car list, was it not?

A. The discount would vary.

Q. Certainly.

A. When we made our estimate for the prices that the Union Company would pay the manufact-rers we took the trade in the country as a whole.

Q. Will you state further the manner of working of the trust—that is, as to how orders would be dealt with? By way of illustration, suppose an order came after the formation of the trust to Camp & Thompson, what would you do with the order?

(Objected to by plaintiff as hearsay.)

I mean an order for sewer pipe.

A. We would turn it over to the Union Company.

Q. What do you mean by turning it over to the Union Sewer Pipe Company?

A. We would turn it over to them to fill.

Q. What would you do with the customer who had given you the order; would you give the order any attention?

A. No, sir.

Q. What would you do with him? You say you would not fill the order.

A. I think it is often filled by the company receiving it.

Q. If you filled it you would report the order and the filling it to the Union Sewer Pipe Company, would you not?

A. We billed right direct to the Union Sewer Pipe Company, and they would bill to the buyer.

Q. You would bill to the Union Sewer Pipe Company at this low card price and the Union would bill to the customer at the actual selling price?

(Objected to as leading.)

A. Yes, sir.

210 Q. What would the Union Sewer Pipe Company do with the proceeds of those sales?

(Objected to as hearsay).

A. Pay for the pipe.

Q. What else would you do with the balance after paying the price that you would bill it to them for?

A. Up to the time I sold out, there was no balance. I don't know what they did with it.

Q. What was the agreement of the terms of the contract as to what should be done with the balance?

(Objected to as leading.)

A. It was divided *pro rata* with the manufacturers, according to the amount that they had contracted to supply.

Q. That is, the manufacturers who were in the trust?

A. The manufacturers with whom the Union Sewer Pipe Company had made contracts.

Q. That is, all the manufacturers of the Akron district?

A. Yes, sir.

Q. What do you mean by dividing it *pro rata* among them?

A. I have been a little wrong in part of this testimony. Can I explain?

Q. Yes.

A. At the time Mr. Thompson and I effected our dissolution of our partnership we had a manufactory at Greentown, within fourteen miles of Akron. I took that plant and Camp & Thompson retained the one at Cuyahoga Falls. I had a manufactory that was outside of the Union Sewer Pipe Company during all the years from the time in April, 1893, until the present time.

Q. From April, 1893, you were a competitor in the open market with the Union Sewer Pipe Company, were you?

A. Yes, sir.

Q. What was the name of your pipe that you made?

A. It was Akron sewer pipe. It was sold at Chicago as Akron sewer pipe.

211 Q. But that is not in the Akron district, is it?

A. I don't know why not; it is nearer Akron than the Crown Fire Clay Company.

Q. What would the limits of the Akron district be?

A. We have treated the Crown Fire Clay Company as being in the Akron district and they are thirty or forty miles away. I don't know whether it would be considered an Akron shop or not. The principal owners live in Akron; they were also the principal owners of Robinson Bros. & Company.

Q. You entered into the agreement with the Union Sewer Pipe Company on its organization, did you not, and Mr. Thompson?

A. Yes, sir.

Q. Do you recollect whether one of you signed in the firm name or whether you both signed or how?

A. Mr. Thompson and I both signed.

Q. At that time you owned the two plants, did you?

A. Yes, sir.

Q. And did the contract relate to the output of pipe from each plant?

A. The Greentown plant was new; there had been no output from it.

Q. Was the Greentown plant included in the contract?

A. No, sir.

Q. Did the contract between Camp & Thompson and the Union Sewer Pipe Company mention the location of the plants affected by it?

A. Yes, sir.

Q. What plant did it expressly mention?

A. With reference to our property?

Q. Yes, sir.

A. It mentioned the Cuyahoga Falls plant.

Q. You were just holding down the Greentown plant at that time, were you?

A. Yes, sir.

Q. It had not actually done any outputting?

A. That is the condition it was in.

212 Q. Was there not a contention between you and the Union Sewer Pipe Company that the Greentown plant was included in the contract?

A. No, sir.

Q. What was the capacity of this Greentown plant?

A. About eight hundred cars a year; about one-eighth of the Akron district.

Q. Was that what you would call a large plant?

A. No.

Q. Mr. Hamlin, you said that Greentown was one-eighth of the Akron district?

WITNESS: Perhaps it was not quite so much.

Q. Was it one-tenth of the whole Akron district?

A. I was just trying to think whether I was right. Last year I put 1,500 cars down there. I think that was about it.

Q. In the beginning of 1893, when it was just about to go into operation, what was its anticipated output?

(Objected to as immaterial)

A. It was our plans to make a one-kiln plant and about 2½ cars to the kiln. That was the intended output.

Q. That is how you get at your figures?

A. Yes, sir; I made them off-handed.

Q. Through your first year what do you think your output was for your plant?

A. Well, we kept agoing.

Q. You didn't get anything like 800 cars out that year, did you?

A. I guess I did.

Q. How would that plant compare with the plant of the National Sewer Pipe Company as to capacity?

A. At that time?

Q. Yes, sir.

A. Twenty-five per cent.

Q. How would it compare with the Akron Sewer Pipe Company?

A. About the same. When you speak of the Akron Sewer Pipe Company, there is two or three plants there together.

213 Q. How would it compare with the Akron Sewer Pipe Company and the Hill Sewer Pipe Company?

A. We had about the same output as one of them.

Q. How would it compare with the Hill Sewer Pipe Company?

A. The Hill Sewer Pipe Company was somewhat smaller, I think. I don't know what their output or capacity is.

Q. And the Buckeye Sewer Pipe Company, how would it compare with that?

A. Somewhat larger.

Q. And the Crown Fire Clay Company, how would it compare with that?

A. I don't know; they had very little capacity at that time.

Q. The Robinsons Bros. & Company, how did that compare with your company?

A. That was about like the Buckeye; a little greater than mine.

Q. And the Summit Sewer Pipe Company, how did that compare?

A. About the same.

Q. You have used the term that the balance of the proceeds of the sales were divided *pro rata*, did you not?

A. I think so.

Q. How was that *pro rata* arrived at, on what basis?

(Objected to as hearsay.)

A. I can't answer that question. I don't know how they arrived at it.

Q. Do you know whether it was estimated according to the capacity or output of the various factories?

(Objected to as hearsay.)

A. There was no such payment made while I was connected with it.

Q. But the contract provided the principal upon which the payment should be made?

A. Yes, sir.

Q. What was that principal or basis?

A. I don't remember exactly whether on the amount of pipe they had furnished to the company or the quota they are entitled to furnish.

214 Q. Was not the quantity they were entitled to furnish to the Union Sewer Pipe Company proportionate upon the capacity of the various factories?

(Objected to as leading and hearsay.)

A. I believe*d* not.

Q. How was it determined and regulated?

(Objected to as hearsay.)

A. I don't remember exactly.

Q. You recollect that the several companies agreed to sell only to the Union, do you not?

A. Yes, sir.

(Question objected to as leading.)

Q. Did they have the power to sell unlimited quantities to the Union, or was the Union compelled only to take a certain quantity or proportion?

(Objected to as hearsay.)

A. The power of giving orders lay with the Union. How they proportioned the orders I don't know.

Q. Well, then, the various companies could only sell to the Union what the Union chose to order from them?

(Objected to by plaintiff as leading and hearsay.)

And they could not sell to the outside public at all, could they?

(Objected to as leading and hearsay.)

A. No, sir.

Q. Do you remember of having an interview with Mr. Dee in or about January, 1893, in Chicago?

A. No, sir.

Q. Do you remember telling him at that time and place that you understood that there was a pool to be formed to control pipe in the Akron district?

A. I think the meeting of Mr. Dee took place at our office at Cuyahoga Falls.

Q. I am speaking about an interview in Chicago.

A. I don't remember.

215 Q. Don't you recollect of telling him that you did not think that you would go into the union; that you did not like the prospects of Mr. David Hill's management of it?

(Objected to as leading.)

A. I don't remember of it. It is very likely. That was the way I felt.

Q. You did not approve of Mr. Hill having control of that union?

(Objected to as immaterial.)

A. No, sir.

Q. Mr. Hill was really the "boss" of the concern during the first two years or say during the time that you were connected with it?

A. It was governed by the trade. Mr. Hill was president.

Q. Mr. Hill was really the man who decided what prices pipe should be sold at, did he not?

A. The state of the markets decided the prices.

Q. I am going to show you five letters, Mr. Camp, and ask you if you can identify the several signatures as being the signatures of your late firm of Camp & Thompson.

A. Yes, sir; that is Harry Thompson's writing.

Q. Each of them?

A. Yes, sir.

Q. I will ask to have these marked for identification respectively Exhibits 4, 5, 6, 7, and 8.

(Counsel for the Union Sewer Pipe Company claim the right and did, in fact, over the protest and objection of counsel for defendant, examine and read the above five letters.)

(Counsel for plaintiff objects to the insertion of this.)

Q. What was the date of the organization of the Union Sewer Pipe Company?

A. In 1893—somewhere in February.

Q. You have resided in the neighborhood of Akron continuously since 1893?

A. Yes, sir.

216 Q. And familiar with the sewer-pipe business in the Akron district during the whole of that period?

A. Well, not very well; I have made very little sewer pipe since the spring of 1893.

Q. You have made very little since then?

A. I perhaps run pretty steady the first of the year, but I switched off into other lines—more profitable lines.

Q. You have not been to any extent a competitor of the Union Sewer Pipe Company after the first year, have you?

A. I became interested in what is known as the Central Company.

Q. That was another company, out of the district, not manufacturing Akron pipe?

A. What is known as River pipe; yes, sir.

Q. The tendency of prices from the end of 1892 down to the time when you ceased manufacturing Akron pipe was on the steady decline?

A. Yes, sir.

Q. With slight fluctuations, but the tendency was downward, was it not?

A. Ever since the end of 1892, for that matter.

Q. How did you pay your subscription to the capital stock of the Union Sewer Pipe Company? I think you stated that you subscribed for four shares, did you not?

A. Yes, sir.

Q. How much did you pay?

A. I paid $40.00—ten per cent.

Q. Do you know what became of that $280.00 that was collected on that subscription of capital stock?

(Objected to by plaintiff as immaterial.)

A. I don't know.

Q. What was the method of doing business if an order for sewer pipe came direct to the Union Sewer Pipe Company itself? How did the Union Sewer Pipe Company proceed to fill the order?

(Objected to by plaintiff as hearsay.)

217 A. While I was a member of the Union Sewer Pipe Company it was in the habit of having two or three members to meet about mail time, and the letters would be read and the orders disposed of in some way. I think they undertook to have three men to give out the orders at first. There was a controversy between them. There was a feeling among them that some were getting a more desirable class of pipe to make than others. How they fixed it I do not know.

Q. You mean by the mail all the orders that were directed or

addressed to the Union Sewer Pipe Company or to any of the various companies or firms connected with it by contract, do you not?

(Objected to as leading by plaintiff.)

A. Yes, sir; and remittances also. I do not know what business they received through the mail.

Q. And the Union Sewer Pipe Company or its committee or board of directors distributed these various orders as they thought proper and as they saw fit, according to the terms of their contract?

(Objected to as hearsay.)

A. They tried to accommodate their customers to some extent by giving them pipe from manufacturers that they preferred. Where they could do that, they made that a point to accom-odate their customers.

Q. That is, if a customer especially wanted or asked for pipe manufactured by Camp & Thompson, the directors of the Union Sewer Pipe Company would give you that order, if the condition of business would permit?

(Objected to as leading.)

A. Yes, sir.

Q. And if it should be over your fair share of orders, what would you then do or receive in payment?

(Objected to as leading and hearsay.)

218 A. They paid for all the pipe shipped by each company every month without reference to quota.

Q. Were you a stockholder or in any way interested in any of these other companies or factories that had contracts with the Union Sewer Pipe Company?

A. No, sir.

Q. Not in any way?

A. No, sir.

Q. Do you know what, generally speaking, was the price at which the Union started out to sell sewer pipe, say of city pipe, subject to city inspection?

A. I think it was eighty per cent. off the list, western list.

Mr. HAMLIN: Sold to whom, the city?

WITNESS: No; sold to dealers in city pipe, subject to inspection by the city.

By Mr. DEAKIN:

Q. You mean city pipe that would stand the inspection of city engineers?

(Objected to by plaintiff.)

A. That had reference to Chicago exclusively. There was a large amount of pipe shipped to Chicago, such as socket pipe, but was not subject to this rigid inspection, and absolutely sold for less money.

Q. That is, the discount would be greater?

A. Yes, sir.

Q. Did not Chicago consume a very large proportion of the output of city pipe in the Akron district?

A. Pipe classed as city pipe went to Chicago. This speaking of city pipe all pertains to Chicago. Still there were Eastern States who were more rigid in their inspection than Chicago.

Q. What would you call that sort of pipe?

A. I don't know as there was any special name for it.

219 Q. The consumption of pipe in Chicago was so considerable that there was a special class or grade of pipe and known by a special name for the Chicago market, was it not?

(Objected to by plaintiff as leading.)

A. Yes, sir; for a great many years Chicago was the only market that laid ring pipe—that is, pipe without socket on one end. Later they got to doing it in the Eastern States.

Q. That kind of pipe constitutes a very large proportion of the output of the Akron district, did it not?

A. Quite a large per cent., but not the majority of the pipe, by a great deal.

Q. That kind of pipe, that ring pipe, then, was manufactured solely for the Chicago market, was it, in 1892 and 1893?

A. Not at that time; no, sir.

Q. What per cent. of it was manufactured for Chicago at the time we are speaking, 1892 and 1893?

A. I should judge half.

Q. Who were the principal dealers that it went to?

A. I do not believe that I can give all of them. Mr. Connelly, Mr. Dee, Mr. Williams, and there was a firm, I think, they called it the Atlas Sewer Pipe Company.

Q. What proportion of the output of the Akron district of sewer pipe, ring and otherwise, went to Chicago, say, during the years 1892 and 1893?

A. I have no way of telling that.

Q. Approximately?

A. 33⅓% approximately. I guess that is too large.

Q. Well, what should you say, 23 to 30%?

A. It would not exceed 25%, and that is guesswork.

Q. Was the Illinois market, besides the Chicago market, of any moment?

A. Never to Camp & Thompson; other members found it was.

Q. Including the whole State of Illinois, what would the percentage be?

220 Q. I guess 25% is big enough for the whole thing.

Q. Where was the chief consumption of Akron pipe?

A. In the New England States.

Q. What part of the country?

A. Boston, Providence—Camp & Thompson never had much eastern trade. They had agencies in Syracuse and the lake cities.

Q. Previously to the formation of the Union Mr. Dee and his father, William M. Dee, had been considered customers of yours, had they not?

A. Yes, sir.

Q. Do you know how many years you had business together?

A. I do not.

Q. Quite a number of years, did you not?

A. Yes, sir.

Q. You were, in fact, furnishing them more pipe than any one else in the Akron district previous to the formation of the Union, were you not?

A. Up to, perhaps, in 1892. I think in 1892 the National Sewer Pipe Company was furnishing them the most.

Q. You still continued to furnish them a great deal, did you not?

A. Yes, sir.

Q. Up to the formation of the Union?

A. Yes, sir.

Q. After the Union was formed did you directly and without the intervention of the Union Sewer Pipe Company in any way fill any more orders of Mr. Dee's?

A. The H. B. Camp Company did.

Q. That was the company at Greentown?

A. Yes, sir.

Q. Camp & Thompson as a firm did not?

A. No, sir.

Q. The H. B. Camp Company frequently came to the relief of Mr. Dee during the years of 1894 and 1895, when the trust here was holding them up too hard?

(Objected to as leading.)

A. I don't remember the circumstances. I know we shipped them pipe along in there.

Q. Did you ever have any information or knowledge of a
221 contract entered into in August, 1895, between Mr. Dee, William E. Dee, and the Union Sewer Pipe Company?

A. Nothing but hearsay.

Q. You heard of such a contract?

A. Yes, sir.

Q. Did you hear that it had any bearing or relation to the business of the H. B. Camp Company?

(Objected to as hearsay.)

A. I don't remember as to that.

Q. Did you ever have any conversation with Mr. Hill or with any one representing the Union Sewer Pipe Company as to the contract they had got from Mr. Dee?

A. I did not.

Q. Did you ever hear of any contract being entered into between the Union Sewer Pipe Company and Mr. Dee which prevented Mr. Dee from taking pipe from the H. B. Camp Company?

A. I had forgotten about —. It seems to me I have a faint recollection of something of that kind being done. I don't remember.

Q. Don't you recollect of having a conversation with the repre-

sentative of the Union Sewer Pipe Company relative to that contract?

A. I do not.

Q. Don't you know that the Union Sewer Pipe Company threatened not to let William E. Dee have any more pipe from them if he had any from you?

(Objected to as hearsay.)

A. I think Mr. Dee told me so.

Q. Did you not have any conversation with the Union Sewer Pipe Company or representatives of the Union Sewer Pipe Company protesting against that contract?

A. I don't remember about that. I can't tell you.

Q. I wish you would just refresh your recollection before the depositions are closed here.

A. I had forgotten. There is a faint recollection of it now, but I can't remember anything about it.

222 Cross-examination by HERBERT HAMLIN.

(Counsel for plaintiff hereby refuse to waive any rights by reason of this cross-examination, and especially state that such examination is conditional and made under protest; that all questions as to a violation of any State or Federal law or the common law in relation to illegal combinations are wholly immaterial, irrelevant, and incompetent under the issues in this case.)

Q. I believe you said, Mr. Camp, that in certain markets what you have called River pipe was preferred?

A. Yes, sir.

Q. That is to say, it was largely a matter of personal preference and taste as to whether River pipe or Akron pipe were the better?

A. Yes, sir; that is the way I felt about it.

Q. In what localities was the River pipe preferred?

(Objected to by the defendant as immaterial.)

A. In the Cincinnati and Pittsburgh district, and, I think, Detroit.

Q. Any of the western cities?

A. Detroit might be called a western city. I guess it was in Indianapolis, too.

Q. Then in the opinion of a large number of dealers throughout the country the River pipe was better pipe than the Akron pipe?

A. Yes, sir.

Q. Now, the expression "Akron district" has been used. Do you understand that this term is synonomous with Summit county?

A. I understand that Mr. Hill for a great many years made that a great card; there was nothing fit to be used but Akron pipe. He used that term for years against the Cuyahoga Falls plant.

Q. That is to say, he used the term Akron pipe as applying to his pipe in distinction to pipe made five miles from Akron, in

223 Cuyahoga Falls?

A. Yes, sir; I think he had a trade-mark; we had a fight over right here in Akron.

Q. Then there has been some litigation, has there not, over the right of certain manufacturers just out of Akron to class their pipe as Akron pipe?

A. I did not state. I meant Akron, the manufacturers here in Akron.

Mr. DEAKIN: Was there anything in the general condition of the pipe market which sent up the prices of pipe in the market of the country generally in the early part of 1893? You have stated that the general tendency of prices from 1892 has been downward; was it not?

A. Yes, sir.

Q. Was there anything *which* in the condition of the pipe market throughout the country in the spring of 1893 which sent the prices of pipe up temporarily?

A. I think not.

Q. There was no change in the condition of things?

A. Not in the market generally.

Q. There was no condition which would change the condition of pipe in the market?

A. There was not in the Chicago locality.

Q. Was there anything in the condition of things in Akron which would naturally and ordinarily tend to raise the price of pipe among the manufacturers?

A. I think not.

Q. After they had been in open competition with each other?

A. I think not.

Mr. HAMLIN (continued):

Q. You stated that the total amount of output of the various factories in and about Akron was about eight thousand car-loads a year, and that your output of your individual factory which never made any contract with the Union Sewer Pipe Company might aggregate in the neighborhood of eight hundred car-loads a year?

A. I said for one year. I am increasing the capacity every year since that time. I do not intend to carry the impression that I have turned out 800 car-loads of sewer pipe, because that
224 was only part of the manufactory. The output of the factory was about eight hundred car-loads.

Q. You stated that prices paid by the Union Company were not precisely equivalent to the actual cost of production paid to individual companies; then there was a margin of profit between these prices paid and the cost of production?

A. Yes, sir; with our factory; that was true of all of them.

Q. How was it with other factories, so far as you know?

A. I guess there is a margin for all of them.

Q. You speak of city pipe. How does what is known as city pipe differ from ordinary sewer pipe?

A. What is known as city pipe is made in three-foot lengths, which is just continuous, slender; there is no hip or socket on one end.

Q. Then the expression city pipe is merely a name applied to the pipe of certain shape and dimensions?

A. More properly speaking, subject to an inspection.

Q. To what tests did that inspection subject this pipe?

A. It must be not more than one-fourth inch out of round and one-fourth out of straight and three-foot length, free from blisters and not chipped on the ends, good color and a good ring.

Q. That is to say, it must have been, generally speaking, a fairly made pipe?

A. Yes, sir: well-made pipe, first-class pipe.

Q. Was the term city pipe applied to pipe of any other shape or dimensions?

A. Yes, sir; it was applied to junctions, grooves, slants—are all classed as city pipe; but that round pipe, what is known as city pipe, was from 9 to 18 inches in diameter.

Q. Was such pipe made by the competitors of the Union Sewer Pipe Company?

A. Yes, sir.

225 Q. Was it made by your private factory at Greentown?

A. It was.

Q. Was it made or sold by the Central Company?

A. It was; yes, sir.

Q. Was it made and sold by companies generally?

A. I think not. It was made by a good many companies, but not generally.

Q. By generally do you mean universally?

A. Nearly so.

Q. But you still say that it was made by a large number of companies?

A. Quite a number.

Q. Then if a Chicago dealer was unable to obtain such pipe of the Union Sewer Pipe Company, you know of no reason, do you, why it might not have been obtained of other companies?

A. There was no reason except that city Akron pipe the contractors got in with less trouble than if they had other pipe, although it might have been just as good pipe.

Q. That is to say, the Akron pipe manufacturers had established a reputation as being reliable parties and as furnishing good pipe?

A. Yes, sir.

Q. And this had increased but not monopolized the Illinois market for Akron pipe, and the Chicago market?

A. Yes, sir

Q. Is it not true that many specifications for pipe to be furnished by Chicago dealers to the city of Chicago provided for Akron pipe or pipe of equal quality?

A. I think so.

Q. Then there was no conclusive demand for Akron pipe in those specifications, generally?

A. I cannot say as to that. Specifications were got out a good many different times, and I cannot tell what they were.

Q. But you believe that they provided for Akron pipe or pipe of equal quality, do you not?

A. That was the case sometimes.

226 Q. Now you say that your Greentown Company, which was a competitor of the Union Sewer Pipe Company, furnished sewer pipe to the defendants in this case, Dee and Connelly, at certain times.

A. Yes, sir.

Q. Did you furnish them with any city pipe during that period?

A. I think I furnished it; I don't know whether I furnished it to Connelly or not, but I have furnished it to Dee.

Q. Did you ever decline to furnish them the city pipe during that period?

A. I guess not.

Q. Then, during that period your Greentown plant was ready and willing to supply them with orders for city pipe?

A. Yes, sir.

Q. During that period, do you know of anything that would have prevented their obtaining city pipe from the Central Company?

(Objected to by defendant as immaterial.)

A. I know of nothing to prevent them.

Q. From whom were Dee and Connelly able during this time to obtain that city pipe?

(Objected to as immaterial.)

A. They could obtain city pipe from up North—Red Wing city pipe. They did obtain city pipe from H. B. Camp Company, and Dee obtained Red Wing pipe. That is all I know just now. I do not know of any reason why Dee could not have gotten it from Columbus or the Central Company.

Q. Any others that you think of?

A. No; I don't think of any others.

Q. But there were three companies?

A. I don't know whether White Hall made city pipe or not.

Q. How large a competitor to the Union Sewer Pipe Company was the Central Company?

(Objected to as immaterial.)

227 A. The sales amounted to or were 50 % greater than the Akron Sewer Pipe Company.

Q. That is to say, about 1½ times as much as the Union Sewer Pipe Company's business?

A. Yes, sir.

Q. Did the Central Company deal in pipe of the same make?

A. No. Their pipe was known as the fireclay pipe.

Q. How does the fireclay pipe differ from other pipe?

(Objected to as immaterial.)

A. It is an entirely different kind of clay; it burns a lighter color.

Q. Is it substantially as good?

A. I think better.

Q. Then you think the Central pipe sold by the Central Sewer Pipe Company was, generally speaking, better than the pipe that was sold by the Union Sewer Pipe Company?

A. That is my judgment—no; I will qualify. I think the best fireclay pipe made was better than the best shale pipe.

Q. Then what do you mean by saying that you believed the Central Company's pipe is better than the Akron pipe sold by the Union Company?

A. The last answer was to qualify an answer that I gave before. I don't think it averages as well as the Akron pipe. It is not as uniform.

Q. Is some of it better than the Akron pipe?

A. In my judgment; yes, sir.

Q. Generally speaking it is best?

A. The very best fireclay pipe is better than the very best shale; it proves stronger in tests.

Q. Would not this city pipe be classed as the best pipe?

A. Yes, sir.

Q. So, if the defendants in this case were called upon to furnish to their customers city pipe, you think it probable that they would be able to obtain better pipe from the Central Company than from the Union Company?

A. Yes, sir.

228 Q. Was the Central Company able to furnish to Illinois or Chicago dealers pipe of this description in large quantities during the period spoken of?

A. They were able to, but they could not always get it in. They would not accept that in Chicago.

Q. That is, the dealers would not?

A. No; the inspectors. The dealers continued to.

Mr. DEAKIN: The engineers would not accept that pipe as a substitute for the Akron pipe?

A. Except what came from my factories.

Q. That was very near the Akron district?

A. Yes, sir.

Mr. HAMLIN—continued:

Q. What object could the inspectors have had in keeping out fireclay pipe?

(Objected to as immaterial.)

A. I think it was their education, not their object.

Q. That is, they were uneducated?

A. They were educated for the Akron pipe.

Q. There was no reason why they could not have educated themselves to other pipe equally as well?

(Objected to as immaterial.)

A. We have made a good many efforts to educate them, but they failed.

Q. Then it was purely prejudice, was it?
A. That is my judgment, purely prejudice.

229 Redirect by Mr. ROGERS:

Q. Mr. Camp, the Akron pipe was generally understood in the market as a shale pipe?
A. Yes, sir.
Q. And that pipe was only manufactured in the Akron district?
A. That is not true.
Q. The pipe known as the Akron pipe was only manufactured in the Akron district?
A. Yes, sir; there are other districts where pipe was made of shale.
Q. But that pipe is not known as Akron pipe, is it?
A. No, sir.
Q. You also stated that Akron pipe was generally reputed in the market, the Chicago market, as a better pipe than the fire clay pipe.

(Objected to as an assumption.)

A. Yes, sir.
Q. Now, this Central Company that you speak of was an organization formed for the purpose of dealing in pipe and buying and selling pipe manufactured along the Ohio river?
A. Yes, sir.
Q. It consisted of a corporation which had contracts with a large number of other corporations which manufactured sewer pipe?
A. Yes, sir.
Q. And the contract that it had with the different manufacturers was a similar one to the one that existed between the Union Sewer Pipe Company and the Camp & Thompson Company?
A. I believed it to be a copy.
Q. Then, if the Union Sewer Pipe Company was a combination for the purpose of controlling prices, then the Central Company was likewise?
A. Yes, sir.
Q. It was the aim and object of both companies from your actual knowledge of the matter, was it not?

(Objected to as leading.)

A. I think so.

230 Q. And that very object was to control the selling price of the products manufactured by the different factories with which they had contracts, and also the output of such factories, was it not—I mean the output of sewer pipe?
A. Yes, sir.
Q. And also the prices of such sewer pipe so far as possible?
A. Yes, sir.
Q. So that as to Mr. Dee or these other Chicago dealers, as a matter of fact, they did control the output of the various factories and the prices of pipe, did they not?

A. Represented by those companies; yes, sir.
Q. With whom they had contracts?
A. Yes, sir.
Q. And also the prices at which such sewer pipe was sold to the dealers, did it not?
A. It controlled the prices so far as it could.
Q. So far as their combination extended, and so far as it took in the various manufacturers?

(Objected to as leading.)

A. The object of controlling was to get as much for the pipe as they could. They did not control it.
Q. But they controlled as far as they were able to, did they not?
A. Yes, sir; I think they did.
Q. But not so far as they wanted to, is that it?
No answer.
Q. And the contracts between the Union Sewer Pipe Company and the manufacturers and between the Central Company and manufacturers covered substantially the entire field of sewer-pipe manufacturers, did it not?
A. O, no; they did not.
Q. Within the State of Ohio?
A. No, sir.
Q. Can you name any manufacturers within the State of Ohio that were not a member of one or the other of these companies?
A. Yes, sir; I can.
231 Q. How many?
A. Three, anyway; I guess there are a good many more.
Q. Can you name any more than three?
A. I don't think of more than three now.
Q. And from your knowledge with how many corporations or manufacturers did the Central Company have these contracts?

(Objected to by plaintiff as immaterial.)

A. I think it was twenty-four.
Q. And the Union Sewer Pipe Company embraced ever- manufacturer of standard Akron pipe?

(Objected to as leading.)

A. Yes, sir.
Q. When was the Central Sewer Pipe Company established?
A. I don't know; some time after the Union.
Q. How long after the Union?
A. I can't tell you.
Q. Was it a year?
A. Yes, sir.
Q. Two years?
A. I think probably two years; maybe not more than one year.
Q. You do not think it would exceed two years?
A. I guess not.

Q. You say city pipe was manufactured by other companies besides those located at Akron?

A. Yes, sir.

Q. Can you name any other companies that manufactured it?

A. I can name some of them.

Q. Is it not true that all the other companies that manufactured city pipe entered into contract with the Central Company?

A. I don't know.

Q. How many did not?

A. All the northwest and the extensive plant at Columbus; they had no contracts with the Central.

Q. Do you say here now that any other factories in the northwest manufactured what is known as city pipe?

A. Yes, sir.

Q. For William E. Dee?

A. I was shown some pipe by Mr. Dee. My information
232 that it was made in the northwest came from Dee. I don't know; I could not swear to it. Dee told me he bought it from Red Wing. It came from Dee.

Q. A contract which I hand you, marked "Exhibit A" and referred to in Mr. Hill's deposition, is an exact copy of the one entered into between the firm of Camp & Thompson and the Union Sewer Pipe Company, is it not?

(Objected to as immaterial.)

A. I believe it to be the same.

Q. I notice in the first article which provides that you were to sell and deliver all the stock in your yards on hand on February 15, 1893. As a matter of fact, that stock was not sold or delivered to the Union Sewer Pipe Company except so far as they ordered from it; is not that true?

(Objected to as immaterial and hearsay.)

A. Yes, sir.

Q. So that it simply amounted to your selling them an option upon that stock in your yards?

(Objected to as immaterial.)

A. Yes, sir.

Q. There was no actual delivery nor it was not intended that it should be paid for unless orders from that company to your company required that stock to be taken?

(Objected to as hearsay.)

A. Yes, sir; that is my recollection of it.

Q. You know that, as a matter of actual knowledge, that where Akron pipe was specified in the contracts in the Chicago markets inspectors or engineers would not permit a substitution of other pipe for the Akron pipe?

(Objected to as too general and leading.)

A. I do not know in regard to that, but I believe that certain influence was brought to bear a great many times where they took other pipe.

233 Q. Then it was by reason of certain influence that was brought to bear that caused them to take other pipe?

(Objected to as leading.)

A. That is my belief.

Mr DEAKIN: You mean by influences improper influences, do you?

A. Yes, sir.

234 HORACE B. CAMP, being called as a witness on behalf of the plaintiff and examined by Herbert Hamlin, deposed and testified as follows:

(Plaintiff's attorney makes such part of the following examination as applies to the question of illegal combination provisional upon the admission of testimony by the court upon the question of the infringement of any Federal or State law or the common law forbidding illegal trusts or combinations in restraint of trade, and plaintiff's attorney intends by this examination to waive no rights of objection to any evidence in the case bearing on that subject as incompetent, irrelevant, and immaterial.)

Q. How long have you been in the sewer-pipe business, Mr. Camp?

A. Thirty-four years.

Q. Are you familiar with the details of that business?

A. I am a little rusty for the last few years I have been identified with the business.

Q. Were you during the years 1893 up to and including 1896 familiar with the general conducting of the sewer-pipe business?

A. More or less.

Q. You were in the sewer-pipe business up to 1896, were you?

A. Yes, sir.

Q. During the period between about the first of January, 1893, and the middle of the year 1896 state whether or not there were numerous companies competing with you in the Illinois market.

A. Yes, sir; there were.

Q. Will you name a few of those competitors?

A. The Columbus Sewer Pipe Company, a couple factories in New Brighton, Pennsylvania, two factories at Red Wing; there was more or less pipe in St. Louis, White Hall, and the Brazil

235 Company came in about that time and Thomas Connelly was making pipe at that time.

Q. Then is it a fact that Thomas Connelly, the defendant in this suit, was one of your competitors?

A. Yes, sir.

(Mr. DEAKIN:)

Q. As a pipe manufacturer?

A. Yes, sir.

Q. State whether or not these companies were entirely independent of the Union Sewer Pipe Company.

A. They were.

Q. There was no agreement of any kind or description between them and the Union Sewer Pipe Company?

A. None whatever.

Q. Did they regulate their prices independent of the Union Sewer Pipe Company?

A. Yes, sir.

Q. Could they sell at lower prices if they wished?

A. Certainly.

Q. Or at higher prices?

A. I guess there would be trouble to sell higher.

Q. You mean by that, that the Union Company's prices were so low that it would have been difficult for these other companies to have met their prices?

A. No, sir. Your last question prior to that one was whether we could have sold for higher prices than the Union Company, and I said it would have been a difficult matter to do it.

Q. The Union Sewer Pipe Company was able to furnish pipe to Chicago and Illinois dealers and did furnish it at lower prices than these other manufacturers were able to supply it at, was it?

A. I didn't say so. I don't think that's true.

Q. Their pipe was not as good pipe in the estimation of that market?

A. It was not thought as much of in the Chicago market.

Q. But in the estimation of other markets it was equally as good, was it not?

(Objected to as immaterial.)

A. In some markets; yes, sir.

236 Q. State whether or not in the estimation of other markets their pipe was considered equally as good.

(Objected to as immaterial.)

A. Some markets preferred the Ohio River pipe.

Q. What effect did the organization of the Union Sewer Pipe Company have upon the prices of pipe generally in the United States?

A. I don't believe it had any effect.

Q. Are you quite sure it had no effect?

A. It had this effect in the Chicago market, that it enabled large dealers to get together and put up prices for themselves in Chicago.

Q. State whether or not the Union Sewer Pipe Company was able at any time between about the first of January, 1893, and the middle of 1896 to control the price of pipe in the Illinois and Chicago markets.

(Objected to as leading.)

A. They did not control my prices after the first of April, 1893.

(Objected to by defendant as not responsive.)

I don't think they were able to control the prices at all.

Q. When contracts were made with Dee and Connelly, the defendants in these suits, what was the invariable rule as to the terms of delivery?

A. I think these contracts were made after I got out of the Union. I don't remember anything about them, only from hearsay, with this explanation: The H. B. Camp Company had a contract with Thomas Connelly for two hundred car-loads of pipe delivered on board cars from Cuyahoga Falls, and the Union Company assumed that contract.

Q. State whether or not their contracts with these defendants generally during this period were ever delivered f. o. b. cars
237 in Ohio.

(Objected to as leading and the witness incompetent to answer it.)

A. That is the custom of Akron manufacturers to make such contracts.

(Objected to by defendant as irresponsive to the question.)

Q. What was the custom during this period of the Akron factories with regard to deliveries to dealers in Illinois and in Chicago?

(Objected to on the ground that the question assumes there was a fixed custom in regard to deliveries.)

A. It was the custom to sell f. o. b. cars at the factories; there were exceptions to the rule, however.

Q. Did the pipe sold by your company to the Union Sewer Pipe Company or did it not ever go to fill the orders during these three years sent in by Dee and Connelly?

A. I don't know. I pulled out of Camp & Thompson's the first of April, but the trade had hardly opened at that time. I don't remember. They were shipping in up to the time that I went out of the company.

Q. Do you know anything, Mr. Camp, with regard to any local agreement existing during the three years of which we have been speaking among the dealers in Chicago?

(Objected to by defendant as irrelevant, immaterial, and there is no indication as to what agreement it referred to; too general.)

A. Only by hearsay.

Q. You may state whether or not one of the purposes of the Union Sewer Pipe Company was to economize expenses of operation of individual companies in and about Akron.

238 (Objected to as leading.)

A. That was one object.

Q. In what way, if any, were expenses economized?

(Objected to by defendant as immaterial and assuming that they were economized.)

A. It requires less traveling men, and, as far as Camp & Thomp-

son was concerned, we did not succeed in getting as good freight rates as some of the Akron people did. Whether the other companies were benefited or not I don't know that.

Q. How much of a saving was there in respect to the salaries of employees?

(Objected to as immaterial.)

A. I don't know hardly how to estimate that.

Q. Was it considerable?

A. I think it was. There were other advantages we found. For instance, if we got an order that some parts of it was lacking at the shop we could load it in part and ship it to any of the other factories to fill it and go on. We could not do that until the organization of the company.

Q. Was there any benefit in respect to ability to ship orders more promptly?

A. Most decidedly.

Q. Will you explain how this was effected?

A. There are more than five hundred different shapes of sewer pipes made. My experience—in running through the winter months I supposed I had a stock of everything on hand which was likely first to be ordered in the spring, but just as likely they would call for something we have not got, but working together in this way some of us would have it. If we had been on our own hook we either had to lose the order or induce the people to wait.

239 The feeling of the people was such that they would not accommodate one another at all before the union was formed.

Q. Was it not a benefit as well to the dealers?

(Objected to as immaterial.)

A. Certainly.

Q. How did the prices obtainable in Chicago during this period above referred to fluctuate?

A. I don't remember.

Q. Generally speaking?

A. I don't remember.

Q. Did they fluctuate?

A. Prices have been going lower ever since.

Q. In the Chicago market?

A. Yes, sir.

Q. And they got lower after the organization of the Union Sewer Pipe Company?

A. They got lower after the organization, certainly, because they were competing for the prices then.

Q. Did they get lower during the existence of that company?

A. I don't remember.

Q. Supposing the Union Sewer Pipe Company had been able during this period of three and a half years to control prices of pipe in Illinois and Chicago, which you say it could not do, what advantage or disadvantage would have accrued to the defendants Dee or Connelly in this case?

(Objected to as being immaterial and as being speculative, calling for a mere guess and in no way an expert opinion.)

A. I believe it would have worked to their advantage.

Q. In what respect?

A. They make more money when manufacturers get good prices for the goods than they do when they are down.

Q. Will you explain how they get better prices?

(Objected to as immaterial and calling for a mere speculative opinion.)

A. There could be so many ways in which it could be done. If they were selling for percentage—any percentage agreed on—
240 at good prices it would be more than if at less: the labor is practically the same.

Q. How would it be in buying on a percentage?

A. If they were buying and selling for what they could get there would be more margin for it.

Q. In what way would there be more margin?

A. Perhaps I can illustrate that better by once more telling what I understand the dealers did in Chicago. They got together and put up prices.

(Objected to as hearsay.)

Q. Am I to understand you to mean that there is no doubt but what the power to control the price of pipe in the Illinois and Chicago markets by the Union Sewer Pipe Company would have been a benefit to Dee and Connelly?

(Objected to as immaterial what counsel understands.)

A. I believe it would work to their advantage.

Q. But as a matter of fact would you say that the Union Sewer Pipe Company was unable to control those prices?

(Objected to as immaterial and speculative.)

A. I think they were.

Q. What was the cause of the cessation of business on the part of the Union Sewer Pipe Company?

(Objected to as immaterial.)

A. Trouble amongst themselves.

Q. Was it due to the threatened proceedings on the part of the attorney general of Ohio?

(Objected to as leading and asking for a mere guess. The witness has distinctly stated that he severed his connection with the Union Sewer Pipe Company on the first of April, 1893.)

241–271 A. I think not; but, on the other hand, I think that the proceedings on the part of the attorney general were brought about through the members of the Union.

Q. Was the business of the Union Sewer Pipe Company continued

after these threatened proceedings on the part of the attorney general?

(Objected to by defendant on the ground that the witness stated that he was not a member of the Union after the first of April, 1893.)

A. I don't know.

Q. How many competitors, roughly speaking, would you say the Union Sewer Pipe Company had in the United States?

(Objected to as immaterial.)

A. Before the formation of the Central Company they had fifty or sixty.

Q. Did they not have more?

A. Well, I guess not. There are about one hundred manufactories, but a good many of them are not competitors. Perhaps there is more than that.

Q. How many competitors would you say that they had in the State of Illinois?

(Objected to as immaterial.)

A. Fifteen or twenty.

Q. Have you any interest in the event of these suits?

A. Not any that I know of.

Q. Then, whatever may be their outcome what would be the effect upon your interests?

(Objected to as a speculative proposition and for an opinion on simply an abstruse legal question.)

A. I don't know. I was a stockholder. I don't know whether I would be made liable or not. That is a legal question. I am not competent.

272 JOSEPH A. BALDWIN, being called as a witness on behalf of the plaintiff and examined by Herbert Hamlin, testified and deposed as follows:

(Plaintiff's attorney makes such part of the following examination as applies to the question of illegal combination provisional upon the admission of testimony by the court upon the question of the infringement of any Federal or State law or the common law forbidding illegal trusts or combinations in restraint of trade, and plaintiff's attorney intends by this examination to waive no rights of objection to any evidence in the case bearing upon that subject as incompetent, irrelevant, and immaterial.)

Q. What is your age?

A. Seventy-seven.

Q. How long have you been in the sewer-pipe business?

A. Something over twenty years.

Q. During the course of those twenty years I suppose you have

become more or less familiar with the details of the sewer-pipe business?

A. Yes, sir.

Q. During the period from about the first of January, 1893, until the middle of the year 1896 what companies were in competition with the Union Sewer Pipe Company in the Illinois and Chicago markets?

(Objected to as immaterial.)

A. I don't know how many companies. There were some in Ohio. I don't know as I can give the names of the companies or their localities. There were two or three in St. Louis. I don't know just now as I can give the names of either. If I should hear
273 their names mentioned I could recognize them, but I don't know now. There is one in Utica, two or three on the river, one north of Chicago, and one in St. Louis, or more; I don't exactly know the name of either of them now.

Q. Were any companies in Minnesota competing with you?

A. I don't know whether there were or not.

Q. Were there any companies in Ohio?

A. I think there were.

Q. What companies?

A. I think there were two companies in the vicinity of Columbus. There was one on this side of Columbus. I am not certain what time they were in competition—what time they were doing business there; and there were some companies in Michigan that were selling there in that market at that time.

Q. Were there any companies in Iowa?

A. I don't know whether they were dealing in Chicago or not.

Q. Was the Chicago market open to these *countries*?

A. I never knew of its being closed to any of them.

Q. Was there any connection of any kind or description, by way of agreement or otherwise, between the Union Sewer Pipe Company and these various competing companies?

A. I think not.

Q. Was there any agreement as to the fixing of prices or as to the regulation of prices?

Q. Between them and the Union?

Q. Yes, sir.

A. I don't know of any.

Q. Then would you say that competition was free and open?

(Objected to as immaterial.)

A. So far as I know; yes, sir.

Q. You may state whether or not you know of any reason which would have prevented those companies from placing their own prices upon the sewer pipe handled by them?

(Objected to as immaterial.)

A. I don't know of any.

274 Q. Will you state what effect, if any, the organization of the Union Sewer Pipe Company had upon the prices of sewer pipe generally throughout the United States?

A. I can't tell you that.

Q. Did the organization of the Union Sewer Pipe Company ever enable that company to control the prices throughout the United States?

A. I think not.

Q. Did it ever enable that company to control prices in the State of Illinois or in the city of Chicago?

A. I don't know as it did in any market.

Q. Upon what terms, as regards delivery, were orders for pipe during those three years sent in to *to* the Union Company by Dee and Connelly based?

(Objected to as immaterial.)

A. I think they were on terms of payment.

Q. Do you mean at the factories?

A. I think they were all delivered at the factories.

Q. In the State of Ohio?

A. Yes, sir; I think so; wherever the factories were.

Q. That is, the factories of the manufacturers?

A. Yes, sir.

Q. How did it compare with profits received at the present time in the Chicago market?

275 A. I don't know whether there is any profit in the Chicago market or not.

Q. Why did you make this statement?

(Objected to by defendant.)

A. We are really doing so little there that I don't know—I don't know that we are doing anything there now.

Q. I am speaking of the profits obtained by dealers in the Chicago markets.

A. I don't know.

Q. As far as you know?

A. I don't know. At present I don't suppose there can be much profit there.

(Objected to by defendant.)

Q. What was the effect of the organization of the Union Sewer Pipe Company upon the expenses of administration of the individual companies with which it had contracts?

A. I think the expenses of the Union Sewer Pipe Company in carrying on business was considerably less than the aggregate expenses of the different companies in selling their ware.

Q. How many salesmen did those companies have, taken as a whole company?

A. Well, I don't know how many salesmen the different companies had. I think I said Saturday—the question was asked how many our companies had. I said none. That was true, with this

explanation, that one of our partners was receiving a salary as traveler, so that while we didn't employ separate salesmen one of our men traveled.

Q. Was he paid for that service?

A. Yes, sir; he was paid for those duties.

Q. Now, as near as you can say, how many salesmen did the individual companies in and about Akron who had contracts with the Union Sewer Pipe Company employ?

(Objected to as immaterial.)

276 A. I suppose from one to three or more. I have no personal knowledge. I should think there were about that many. That is the best information I had.

Q. How many salesmen did the Union Sewer Pipe Company employ from 1893 to 1896?

A. Well, sometimes one, sometimes two, and sometimes three. I think at one time we had three.

Q. Did you ever have more than three?

A. I think not; I don't think we had more than three at any one time.

Q. Were there one or two or three salesmen employed by the Union Sewer Pipe Company under the arrangement made with the individual companies to do the work of the salesmen formerly employed by those individual companies?

A. I supposed that to be our judgment in the management of the business.

Q. Then a large number of salesmen were dispensed with under those arrangements?

(Objected to by defendant as leading.)

A. I think several.

Q. Were there any other respects in which expenses of administration were decreased by the organization of the Union Sewer Pipe Company?

A. Of course I know nothing except in our two companies in which I was interested. There was some saving in labor; how much in expenses I don't know.

Q. Was there any saving as respects freight charges?

A. I think there was.

Q. What was that saving? Were you able to obtain lower rates?

277 A. Why, yes; sometimes some factories were located where they could not reach all the different places they were to ship to at the same rates as we could from other shops.

Q. Was there any saving as regards the ability to handle orders more promptly?

A. Yes, sir. We thought it enabled us to fill orders more promptly.

Q. Will you explain how this was brought about?

A. Each of the shops were supposed to carry, and required to carry, an assortment of pipe, but it was practically impossible for any one shop to carry a complete assortment of reasonable quantities

of pipe to supply all orders, while putting them all together we could always do it.

Q. During your connection with the Union Sewer Pipe Company as president and as a director, did you ever hear, previous to the commencement of this suit, any denial having been made by Dee or Connelly of the receipt of the goods sued for or as to the quality of those goods?

(Objected to on the ground that it is purely hearsay evidence.)

A. I have no knowledge of their denial of the receipt of the goods, but I would not say that they never complained of the quality, or a few pieces short, or something of that kind.

Q. If there ever was any such complaint as to quality, was it a considerable one or not?

A. I think not. It is not unusual to have persons complain of a few pieces of pipe that is not up to the standard, or that there is sometimes a few pieces short in the invoice.

(Objected to as irresponsive to the question.)

278 Q. Did you ever have any conversation during the active operation of the Union Sewer Pipe Company with William E. Dee or Connelly with regard to the effect that the organization of the Union Sewer Pipe Company had upon the individual companies in Chicago?

A. Yes, sir; at different times I heard that matter talked over. I talked it over with them.

Q. How did they express themselves upon the subject?

A. Why, as pleased with the arrangement that they made with us and we with them—that is to say, we sold to a less number of parties in Chicago under the arrangement we had with them than we had been selling before.

Q. You mean by this that the competition which Dee and Connelly had to meet in the Chicago market was reduced?

A. We placed the pipe in the hands of a less number in Chicago.

Q. How did this affect the defendants?

A. I suppose, naturally, it would lessen their competition. Before, we were selling direct to parties that they were selling to. They are middlemen between us and the consumer.

Q. Do you mean to say that after the organization of the Union Sewer Pipe Company the individual companies here ceased selling direct to purchasers of pipe in Chicago?

A. These individual companies did not sell to anybody. They had to sell to the Union.

Q. Had the individual companies in and about Akron previous to the organization of the Union Company sold direct to purchasers of pipe in Chicago?

A. I think so. Our companies had, and I suppose the other companies had.

Q. How did Dee and Connelly express themselves in these interviews of which you speak, as to the advantage or disadvan-
279 tage that they derived from the organization of the Union Sewer Pipe Company?

A. They expressed themselves as feeling that it was to their interest; that their interest was best promoted by the arrangement that was made with them.

Q. And by the arrangement that the Union Company made with the individual companies?

A. I don't know as they were affected by the arrangement that the individual companies made with the Union Company. It only cut the individual companies out as competitors.

Q. Then it was a benefit?

A. They so expressed themselves.

Q. Were they desirous of a continuation of the operation of the Union Sewer Pipe Company?

(Objected to as immaterial.)

A. I understood so.

Q. Did you understand so from the conversations you have had?

A. Yes, sir.

Q. With them?

A. Yes, sir.

Q. Do you remember any specific instances when these defendants had so admitted to you?

A. As to dates, do you mean?

Q. Not as to dates, but any instances which fix themselves in your mind.

A. Why, at times when they were in our office; the dates I can't tell you when they were. I have no means of getting at it now. It was during the time they were dealing with us.

Q. Were they in Akron frequently?

A. Several times; I don't know how often.

Q. Did they ever express themselves as desirous of buying direct from individual companies rather than the Union Sewer Pipe Company?

(Objected to as irrelevant.)

A. I don't know as they did.

280 Q. State whether or not one of the chief objects of the Union Sewer Pipe Company being organized was the economy of operation resulting therefrom to the various individual companies with which it had contracts.

(Objected to as immaterial.)

A. It was my thought in going into the Union; yes, sir.

Q. Assuming that the Union Sewer Pipe Company had been able to control prices of pipe in the Chicago market during the years 1893 and 1896, inclusive, how had that affected the dealers in the Chicago market?

A. They would have made more money out of it all around, I think.

Q. Will you explain in what way such an arrangement would

have benefited Chicago dealers could such a control have been exercised?

A. If we could have controlled prices in Chicago? We tried to make money for ourselves and for our friends who were handling our ware.

Q. Would those dealers have been enabled in such a case to have received better prices on their own sales?

A. I think, perhaps, the competition among themselves was, perhaps, the worst competition that they had. I don't know whether that answers the question or not.

Q. Do you know of any agreement or arrangement ever having been made among the dealers in sewer pipe in the city of Chicago whereby they sought to fix the prices of pipe in that market?

A. I supposed that the dealers there had an agreed price between themselves at which they would sell pipe.

281 Q. Did this agreement include the defendants Dee and Connelly?

(Objected to.)

A. Yes, sir. We supposed that they themselves had an agreement of that nature.

Q. Was this fact a well-understood one among manufacturers in Akron?

(Objected to as what he understands.)

A. I think so.

Q. Is it not a fact that among the numerous competitors whom you have testified your company had in the Chicago market certain kinds of pipe were made which was substantially, though not precisely, similar to pipe manufactured by the Akron companies?

(Objected to on the ground that no manufacturer is willing to concede that there is any pipe as good as his.)

A. Yes, sir: if I understand the question. Most of manufacturers aim to make practically the same pipe—the same class of pipe—that Akron shops make.

Q. You have stated on your previous examination that you are not familiar with the details of the trouble with the attorney general of Ohio which grew out of the lawsuit instituted by Mr. Hill against the Union Sewer Pipe Company. How is it that you are not familiar with those details?

A. Mr. Baird was attorney and interested also in the matter, and so far as I was concerned it was left in his hands. I did not interest myself in the matter.

Q. Did you look upon the matter as one of no great seriousness?

(Objected to as immaterial.)

A. The course that we took would indicate that we looked on it somewhat seriously.

282–316 Q. Was it not more or less a family squabble due to certain differences between Mr. Hill and the other directors of the Union Sewer Pipe Company?

(Objected to by defendant.)

A. I think so; I think that proceeding was not commenced until after Hill retired from the directorate. His son was in his place, I think—no other man, I guess.

Q. Now, roughly speaking, how many competitors would you say the Union Sewer Pipe Company had during the years from 1893 to the middle of 1896, throughout the United States?

A. I can't tell you; I suppose seventy-five or a hundred manufacturing establishments in the country. How many of them reached that market, I don't know.

Q. As near as you can state, how many?

A. I have no means of knowing; several in Illinois, Missouri, Michigan; perhaps some in Indiana. I don't know how many.

Q. Roughly speaking, how many would you say that company had in the State of Illinois?

(Objected to as having already been answered.)

A. I should say there were five or six companies in Illinois that I suppose reached that market.

Q. How many companies are competing with you, not necessarily Illinois companies, but are competing with you in the Illinois market?

A. I have no way of knowing.

Q. But the number was quite large, was it not?

A. O yes; there were quite a good many.

317 HARRY THOMPSON, being called as a witness on behalf of the plaintiff and examined by Herbert Hamlin, testified and deposed as follows:

(Plaintiff's attorney makes such part of the following examination as applies to the question of illegal combination provisional upon the admission of testimony by the court upon the question of the infringement of any Federal or State law or the common law forbidding illegal trusts or combinations in restraint of trade, and plaintiff's attorney intends by this examination to waive no rights of objection to any evidence in the case bearing upon that subject as incompetent, irrelevant, and immaterial.)

Q. Are you generally familiar with the details of the sewer-pipe business?

A. In the manufacturing or selling?

Q. Both.

A. Yes, sir.

Q. Will you name over some of the companies competing with the Union Sewer Pipe Company during its existence in the Illinois and Chicago markets?

Q. The Red Wing of Minnesota, the Brazil Sewer Pipe Company, the Mammoth Sewer Pipe Company, and the works located at

Aultman Junction, two or three shops in St. Louis, the White Hall Fire Clay Company, the Mecca Sewer Pipe Company, and the Utica Company.

Q. Had those companies during the operation of the Union Sewer Pipe Company any contractual arrangement, agreement, or understanding of any kind whatsoever with it as to fixing or regulating or in any way influencing the prices of sewer pipe in the Chicago and Illinois market?

318 (Objected to as immaterial.)

A. Not that I am aware of.

Q. What was the effect of the corporation of the Union Sewer Pipe Company and of the contracts made with the individual companies in and about Akron upon the price of pipe generally in the United States?

A. It gave them—where there was a large contract the shipment could be made more promptly.

Q. I am speaking of the effect upon the prices of sewer pipe. Could they control the prices?

A. No; they could not, to a certain extent, not with all these other factories outside.

Q. Do you mean to say they could not control the prices?

(Objected to by defendant as incompetent.)

Q. Could they control it to any extent generally throughout the United States?

A. They could get better prices where there was no other shop located.

Q. Could they control the prices?

A. No; I don't think that they could.

Q. Could they control the price of pipe in the Illinois market?

A. No.

Q. What were the terms of the contracts for pipe between the Union Sewer Pipe Company and the defendants in these cases as regards delivery?

A. Delivery was made from on board cars at the works of the Union Sewer Pipe Company, and where there was any reductions the factories that would ship the pipe would have to stand the loss.

319 Q. Would you say that the margin of ten per cent. between the purchase price and the selling price given to these defendants by the Union Sewer Pipe Company was a good margin of profit?

(Objected to by defendant as immaterial.)

A. What do you mean? Ten per cent. on the gross or net?

Q. I mean a purchase at 85 off, for instance, and the sale at 75 off.

A. I don't know. It all depends on what expense the agent has. I might have to—a lot of times I might have to deliver pipe to a great distance, and if there is any objections I will have to carry it back.

Q. Generally speaking, would that be a good profit?

A. Yes, sir.

Q. What is the effect of the organization of the Union Sewer Pipe Company and of the contractual relations established with companies in and about Akron to purchase other pipe upon the expenses of operation of those various companies?

A. They could market the pipe much cheaper. They would have a less number of men on the road to solicit, and where a dealer or customer in one place might be a dead-beat he would be known to the company, while if we was all running separate the manufacturer who had filled an order for him would not say anything to the next person and let him try him; and you take a factory, for instance, like the National Sewer Pipe Company, they are a large concern, and they have to make all kinds of pipe, deep socket, double socket, and what is known as standard Akron pipe, which is of a standard thickness. Now, if an order should come in for a different kind of pipe one factory could make double socket and deep socket, while
320 another factory could make the standard pipe, and all the factories would not have to carry such a large amount of pipe in stock.

Q. Was there any economy in the matter of the ability to ship from factories near to the lines connecting the points of consignment?

A. Yes, sir.

Q. Was there any profit in the way of office help?

A. As far as my factory was concerned, we never had any traveling men at all. It did not require so much work.

Q. Was there any economy in the matter of ability to fill orders promptly?

A. Yes, sir.

Q. Will you explain what it was?

(Objected to as immaterial.)

A. There were advantages in this, when a factory has not got a certain kind of pipe in stock it can be shipped from some other factory.

Q. Does it ever happen that companies lose orders through the inability to have stock on hand in this way?

A. Yes, sir.

Q. Was this fact of the economy of administration or was it not an important reason for the formation of this company?

(Objected to as immaterial.)

A. Yes, sir; economy in the ability to fill orders more promptly.

Q. How closely does pipe made by the competitors of the Union Sewer Pipe Company resemble the pipe made by that company?

A. There are no two factories that I can say that make pipe that look exactly—that look exactly the same.

Q. That is, no two factories having contracts with the Union Sewer Pipe Company or no two factories generally?

A. I don't think that there are two factories that make pipe exactly alike.

321 Q. No two factories anywhere?

A. Well, yes, generally. I am only speaking roughly.

Q. How closely does the pipe sold by the Union Sewer Pipe Company resemble pipe sold by other companies?

A. It don't resemble it so close but what I can tell it.

Q. But it has a substantial resemblance in a general way?

(Objected to as leading.)

A. Yes, sir.

Q. Is it a fact, or is it not, that sewer pipe generally as manufactured by companies throughout the country bears a certain kind of resemblance?

A. Yes, sir.

Q. Would the difference between the pipes of the same description as manufactured by different companies be a matter distinguishable to a person disconnected with the sewer-pipe business?

A. Yes, sir; I think they could tell that the two were not alike.

Q. Are they substantially alike so far as shape, durability, and other qualities are concerned?

A. Yes, sir.

Q. What were the causes of the cessation of business on the part of the Union Sewer Pipe Company?

(Objected to as immaterial.)

A. Internal dissensions.

Q. Internal dissensions where?

A. Among themselves.

Q. Among whom?

A. Among the directors.

Q. Do you know anything about the preliminary hearing before the attorney general of the State of Ohio to attack the legality of the business of the Union Sewer Pipe Company?

A. I was told that they were going to commence proceedings—that is, Mr. Hill was.

322 Q. What was the cause of these threatened proceedings?

A. On account that Mr. Hill did not get his pay for the Sperry sewer-pipe works.

Q. Did any person at any time, to the best of your knowledge, ever attempt to question the legality of the business of the Union Sewer Pipe Company other than Mr. Hill?

(Objected to as incompetent, irrelevant, and immaterial.)

A. Not to my knowledge.

Q. Did the Union Sewer Pipe Company continue the operation of its business after this trouble with the attorney general?

(Objected to as incompetent, irrelevant, and immaterial.)

A. Until that was settled up—everybody was at sea until it was settled.

Q. How long after this preliminary hearing did the Union Sewer Pipe Company continue to do business?

A. Up to April, 1896.

Q. How long was this after this preliminary hearing?

A. Why this was—I don't quite remember the time. I think it was about a year afterwards.

Q. Do you know anything of any local combination among the dealers in Chicago during the operation of the Union Sewer Pipe Company?

(Objected to as irrelevant, incompetent, and immaterial.)

Q. During the time there—there was other dealers that wanted to handle the entire output there?

—. They wanted to handle all the pipe that came from Akron and shut off any smaller dealers.

Q. Who were those dealers?

A. Dee, Connelly, and Williams.

Q. What combination did they form among themselves, if any?

323 A. I don't know that they had any combination, personally, myself.

Q. What was the common report among the sewer-pipe men in this locality as to that effect?

A. That they had an understanding among themselves—Dee, Connelly, and Williams.

Q. What was the purpose of that understanding?

(Question objected to by defendant on the ground that it is entirely outside the issues of this case.)

A. To raise the price.

Q. Was that attempt successful?

(Objected to as immaterial.)

A. I don't know whether it was or not. I don't know that they ever completed it, now that matters have not been settled up.

Q. Supposing it had been possible for the Union Sewer Pipe Company to have controlled the prices of pipe in the Illinois and Chicago market during the operation of the company, what would have been the effect of that ability upon the business of the local dealers in Chicago?

(Objected to by defendant as purely speculative.)

A. They would shut out the local dealers, and those other dealers would have the monopoly of it—that is, pipe coming from this district.

Q. Would it have been a benefit or a disadvantage?

(Objected to as immaterial.)

A. It would have been a benefit to them, and they often said so.

Q. Who has often said so?

A. Dee, Connelly, and Williams.

Q. Did you ever hear them say so?
A. Yes, sir.
Q. Whom did you ever hear say so?
A. Mr. Connelly, Williams, Dee, and Hardin.
Q. On what occasions, if you remember?
A. At times when I have been there with them at Chicago,
324 and also here. I never met Mr. Williams here. I met Mr. Dee and Mr. Connelly.
Q. Do you remember any specific occasions?
A. No; only in talking with them. I happened to be there and I talked with them in a general way.
Q. What, in substance, did they say?

(Objected to that part of the question, "in substance.")

A. They claimed that it was a good thing and wanted to know why we did not get together again, and what the prospects were of getting together again; they said that they could not make any money.
Q. Did Mr. Dee ever say that?

(Objected to as immaterial.)

A. I don't know. They always claimed that they could make more money when the Union was together than when it was apart and the prices dropped.
Q. What prices do you mean dropped?
A. Our prices to them, and they consequently had to sell at a lower price to the builders or to the city.
Q. Did Dee ever make this statement?
A. Yes, sir.
Q. Did Connelly ever make this statement?

(Objected to as immaterial.)

A. Yes, sir; he said that we cannot make any money.
Q. Did your company, Camp & Thompson, previous to the formation of the Union Sewer Pipe Company, ever sell any goods direct to consumers in Chicago?
A. Yes, sir.
Q. Did you after your contract with the Union Company?
A. No, sir; not any pipe.
325 Q. State whether or not this was an advantage to the local dealers in Chicago.

(Objected to by defendant on the ground that the Chicago dealers know best themselves.)

A. It was an advantage to them in knowing where they could get the cars shipped promptly when they placed their orders. After the Union was in existence they expected to get their goods as quick as they ordered it. Prior to the Union company the companies did not carry the stock on hand and they had to wait.
Q. Was it any advantage in that respect by reason of shutting out competition from the Akron locality?

(Objected to as immaterial.)

A. No; it did not shut out competition entirely.

Q. State whether or not it shut out any competition between the Chicago dealers and the Akron factories?

A. It simply cut out competition of the Akron factories—that is, those that handled the Union sewer pipe. There was other pipe going in there, so there was competition from other concerns outside of Akron.

Q. State whether or not this shutting out of competition between the individual companies in and about Akron and Dee and Connelly was a benefit to them.

A. It was a benefit to Dee and Connelly.

Q. Do you remember that a contract was ordered to be assumed by the Union Sewer Pipe Company with William E. Dee, which contract it was claimed by this defendant had been entered into with him on the part of Camp & Thompson Company for the purchase of some 308 cars of pipe?

A. It was understood what orders each factory had was to
326 be turned over to the Union company, and they were to fill them at the prices they were taken for.

Q. Do you remember this agreement?

A. There is a letter right there that explains that. That was written by Mr. Camp. Mr. Dee wrote a letter shortly after his father's death, stating that he had some unfinished contracts to fill and he claimed that it would not be more than right to fill those contracts, inasmuch as we had been supplying him the year before; also that National had been supplying him.

Q. Did you refuse to do this?

A. The matter was referred to Mr. Camp and he went to see Mr. Hill.

Q. What did your company finally do in the matter?

A. When the orders were sent in Mr. Dee would state which factory he wanted the pipes shipped from. If I remember correctly, we did not ship a great deal that coming year to them.

Q. After Mr. Camp conferred with Mr. Hill about this matter what was done, if you recollect?

A. I don't know.

Q. Did the Union Sewer Pipe Company charge Dee a higher price for pipe at any time than that at which the same had been offered to him by the Camp and Thompson Company just preceding the formation of the Union Sewer Pipe Company?

A. I don't know what they charged him. I don't know what the Union Sewer Pipe Company charged Dee or Connelly or any of them. We simply sold right direct to the Union Sewer Pipe Company. Mr. Rockwell could answer that question; he had charge of the office.

Q. Were you familiar with the details of this transaction with Dee?

A. Not fully.

327 Q. How many competitors has the Union Sewer Pipe Company in the United States generally?

(Objected to as immaterial.)

A. In the neighborhood of one hundred factories.
Q. How many in the Illinois market?
A. About twenty or more.

Cross-examination by Mr. ROGERS:

Plaintiff's attorney makes the same general objection to the following testimony as was made to the testimony of this witness when called by defendant, and it is stipulated between the attorneys of the respective parties hereto that this objection may apply to all the questions in this cross-examination without the same being repeated to each question.

Q. You stated that the formation of the Union Sewer Pipe Company was a benefit to Mr. Dee and Connelly and one or two other dealers, in that it wiped out competition?
A. Yes, sir.
Q. You also stated that it was a benefit to them in enabling them to keep up prices, did you not?
A. Yes, sir.
Q. And you also stated that when the Union Sewer Pipe Company went under that it was an injury to them because it cut the prices and brought them into competition with lower prices, did you not?
A. The prices were reduced all over the country.
Q. Didn't you say that they complained after the Union Sewer Pipe Company was bu-sted that prices went down and they were not making as much money as before?
A. Yes, sir.
Q. And they also stated that when the company was in existence prices were higher and they were making more money?
328 A. Yes, sir; not losing any.
Q. And the object of the Union Sewer Pipe Company was to assist them to get better prices by shutting out competition for standard Akron pipe?
A. Well, outside of those three dealers we did not want any more than those, except they didn't want ring pipe. It didn't make any difference about the socket.
Q. Is it not a fact that the Union Sewer Pipe Company constituted those other men their agents in Chicago?
A. No, sir.
Q. And their exclusive agents?
A. Not any more than one particular person would be. If I go to work and sell to a man in Chicago, he is my agent.
Q. Do you mean to say that other persons could have bought standard Akron pipe from the Union Sewer Pipe Company at the same prices—other persons in Chicago besides those three men?
A. They did.
Q. How many others?
A. John Hardin, James B. Clow, N. D. Evans & Son, and Daniel Hardin.

Q. They were big dealers who were handling the standard Akron pipe?

A. Yes, sir.

Q. I hand you a letter, marked for identification "Exhibit 31," dated May 26, 1896, from which I read the following:

"It is rumored here that you are still handling other makes of pipe, and I wish to give you a little hint on the inside that there is going to be a watch placed over all the Akron agents in Chicago, that we may know where we are standing." From your knowledge of the way in which the Union Sewer Pipe Company transacted business, was not that one of the methods used?

A. No, sir.

329 Q. Do you mean to say that they did not watch whether the agents handling their pipe also handled other pipe?

A. Yes, sir.

Q. Don't you know that the Union Sewer Pipe Company in its operation did watch to see whether they handled other pipe?

A. Why, no; not more than usual.

Q. Then you mean that they did a usual amount of watching?

A. No. If I would go around and see some other make of pipe in there I could do it without any special watching.

Q. And you would call the attention of the company to that fact?

A. Yes, sir. Not that I was instructed to do so. I would just tell them.

Q. You would note that fact?

A. Yes, sir.

Q. It is a fact that, outside of the men whose names you have mentioned, the Union Sewer Pipe Company did not sell its brand of pipe in the Chicago market?

A. They might have sold to more, but I just mentioned those that I happened to know that they were selling to.

Q. They did not sell to small dealers, did they?

A. They did not sell ring pipe to small dealers; but socket pipe they did.

Q. In the operation of the company, did they not sell ring pipe to some of the smaller dealers?

A. John Hardin had some ring pipe, and I don't know but what Clow had some.

Q. But their aim in carrying on business of the Union Sewer Pipe Company was not to sell to the smaller dealers?

A. That was the request of these three men.

Q. You endeavored to comply, in the carrying on of the business, with their request?

A. Yes, sir.

Q. That is, those three men and the Union Sewer Pipe Company had an understanding that they would not sell ring pipe to any small dealers?

A. I was not the manager.

330–347 Q. That is a fact, is it not?

A. Yes, sir.

Q. And in that way it enabled those dealers to keep up the price on ring pipe?

A. If they wanted to they could come to an agreement among themselves.

Q. In that way it enabled them to drive out other competitors who desired to handle standard Akron pipe?

A. Other pipe was coming in there; yes, sir.

Redirect examination by Mr. HAMLIN:

Q. Did the Union Sewer Pipe Company, after its organization, put the price of pipe up in the Chicago market?

A. I think not. I think it was gradually getting lower all the time. I don't see how they can make it.

Q. And how had prices been going in that market since the formation of the Union Sewer Pipe Company?

A. They have been going down ever since I have been in the sewer-pipe business.

Q. If Dee and Connelly were unable by the existence of the Union Sewer Pipe Company to get better prices in the Chicago market to what was that due?

(Objected to as immaterial, incompetent, and irrelevant.)

A. On account of their own arrangement among themselves.

Recross-examination by Mr ROGERS:

Q. And the fact that you assisted them in carrying out that arrangement by refusing to sell ring pipe to other dealers?

(Objected to by plaintiff on the ground that the cross-examination has closed and no new matter has been brought out.)

A. We helped all of the men.

Adjourned until Tuesday morning, June 7, at 9 o'clock a. m.

348 Q. What has been the general trend of prices since the formation of the Union Sewer Pipe Company?

A. Downward.

Q. Steadily downward?

A. Yes, sir.

Q. Then the organization of the Union Sewer Pipe Company did not have the effect of keeping prices up?

A. Not to a great extent; no. There was too much outside competition.

Q. Then if the prices placed upon the pipe purchased of the companies with which it had contracts were placed above a reasonable figure that company would be forced, would it not, by competition to come down from that figure?

A. Yes, sir.

Q. When you stated that it was true in a certain sense that a dealer was enabled to get better prices what did you mean?

A. That the agent—why, the man who handles four or five hun-

dred cars a year is entitled to a little better prices than the man who handles one or two cars.

Q. Now, you stated that the prices went steadily down after the formation of the Union Sewer Pipe Company. If this is true, you do not mean to say, do you, that the manufacturers were enabled to get better prices by this arrangement?

A. No; the manufacturers did not get better prices.

Q. How many agents, in the strict sense of the word "agents," has the Union Sewer Pipe Company ever had in the city of Chicago, if any?

A. Well, I can't answer that question—whether it was three, five, or six.

Q. Isn't it true that the only agent they ever had was Mr. Williams, that ever sold the Union Company's product on commission?

A. Yes, sir.

349 Q. When you used the word agent you used it in the sense in which any retail dealer is an agent of the wholesale dealer from whom he buys goods?

A. The word agent is applied to those who handle several hundred cars, perhaps, and the word dealers is applied to those who handle only a few.

Q. In other words, the word agent only meant a big dealer?

A. Yes, sir; that is all.

Q. These agents were permitted, were they not, to sell at as high a price as they were enabled to receive?

A. I think so.

Q. What was the practical effect of any arrangement the Union Sewer Pipe Company might have had with Dee or Connelly whereby they agreed to sell pipe at a fixed price?

A. The arrangement was beneficial to them.

Q. But was the arrangement a success; was it lived up to?

A. My impression is that it was not.

Q. Is it not a fact that continual complaints were being made on the part of the manufacturers in Akron to the effect that that agreement was not being lived up to and never had been?

A. There was complaints that the agreement was not being lived up to.

350 Ed. M. Buel, being called as a witness on behalf of the plaintiff, deposed and testified as follows:

Plaintiff's attorney makes such part of the following examination as applies to the question of illegal combination provisional upon the admission of testimony by the court upon the question of the infringement of any Federal or State law or the common law forbidding illegal trusts or combinations in restraint of trade, and plaintiff's attorney intends by this examination to waive no rights of objection to any evidence in the case bearing on that subject as incompetent, irrelevant, and immaterial.

Examined by HERBERT HAMLIN:

Q. How long have you been connected with the sewer-pipe business?

A. Since the formation of our company in 1890.

Q. Are you familiar with the details of that business?

A. I am not particularly so; no.

Q. But in a general way you are?

A. Yes, sir.

Q. To what extent have you had dealings with dealers in sewer pipe in the city of Chicago?

A. Well, before our contract with the Union Sewer Pipe Company we sold considerable pipe to Dee and some to Connelly and various ones in Chicago.

Q. These dealings have been extensive, have they not?

A. Yes, sir.

Q. Will you name over, so far as you can remember, the various sewer-pipe companies which competed with the Union Sewer Pipe Company in the Illinois and Chicago markets between about the first of January, 1893, and the middle of the year 1896?

(Objected to as immaterial.)

351 A. Blackmere & Post, Locklead Fire Clay Company, Evans & Hard; there was a factory at Streator, Illinois; William E. Dee, the Brazil Sewer Pipe Company; I think possibly the Cowder, Macatoo & Chicago Sewer Pipe Company; two at Red Wing, Minnesota; some others that I have forgotten in the neighborhood or more.

Q. How many companies would you say, roughly speaking, were competing with the Union Sewer Pipe Company during this period generally throughout the United States?

A. Probably ninety or a hundred companies.

Q. Was there at any time during the operation of the Union Sewer Pipe Company any agreement, arrangement, or understanding between that company and these various competing companies throughout the country to which you have referred with regard to fixing or regulating the prices of pipe to be charged by those companies in the Illinois or Chicago market or any other market?

(Objected to by defendant as immaterial.)

A. I think there was no arrangement in either market.

Q. So far as the Union Sewer Pipe Company was concerned, they were at liberty, were they not, to place whatever prices on their own pipe they chose?

A. Certainly.

Q. What would you say was the effect of the organization of the Union Sewer Pipe Company, say throughout the United States, upon the prices of sewer pipe?

(Objected to as incompetent, irrelevant, and immaterial.)

A. It did not have very much effect upon the prices.

Q. What effect would you say the contracts made by the individual companies in and about Akron had upon the prices of pipe generally in this country?

(Objected to as immaterial.)

352 A. Well, these contracts possibly lessened the competition and in that way might have some effect upon the prices.

Q. Was the Union Sewer Pipe Company able at any time to control the prices of pipe in the general market?

A. No.

Q. By what was that price controlled?

A. Possibly by the state of the market and the demand for the pipe and possibly how badly the manufacturers wanted to raise money.

Q. Was it not also regulated by the competition which the Union Sewer Pipe Company had to meet?

(Objected to as leading and otherwise incompetent.)

A. Competition effected prices; certainly.

Q. Was the Union Sewer Pipe Company able at any time to control the prices of pipe in the Illinois and Chicago markets?

(Objected to as irrelevant, incompetent, and immaterial.)

A. No; it was not.

Q. During the three years above referred to where were the deliveries made of orders sent in to the Union Sewer Pipe Company by Dee or Connelly?

A. The pipe sold to them was delivered to them on board cars at the factory.

Q. Where are those factories?

A. The factories that were under contract with the Union Sewer Pipe Company are located in this vicinity—in the vicinity of Akron; either in Akron, Cuyahoga Falls, or Barberton.

Q. Will you state whether such a margin of profit as allowed to William E. Dee under the contract sued upon in the suit now being heard, which margin consists of ten per cent. between the price of purchase and the selling price, is a fair profit as prices go?

353 (Objected to as irrelevant, incompetent, and immaterial, and the witness not being competent to pass judgment.)

A. I should say that profit was very good.

Q. How would it compare with profits now being made by dealers generally throughout the country?

A. They make so little now.

Q. Will you explain, as fully as you can, the advantages, if there were any, by reason of the individual companies contracting with the Union Sewer Pipe Company—by reason of those contracts?

(Objected to as incompetent, irrelevant, and immaterial.)

A. The benefits were considerable on account of the deduction of expenses that it rendered.

Q. Will you describe in detail in what that reduction consisted?

A. Well, in necessitating less office help for the individual companies and a less number of traveling men, stationary, postage, and those incidental expenses that were necessary to the business.

Q. Was there any saving in the matter of freight charges?

A. Well, some, possibly; not so very much, though, because factories under contract were all located—no; I will take that back. One company had better freight rates. There was quite a saving in freight rates.

Q. Was there any saving in the matter of an ability to ship from factories nearer to the point of consignment?

(Objected to as irrelevant.)

A. Yes, sir.

Q. Will you describe in what this consisted?

(Objected to as immaterial.)

354 A. Pipe shipped from the factories in Huntington could be shipped East at a much less freight rate. That made a saving.

Q. Was there any saving as regards ability to fill orders promptly?

(Objected to as leading.)

A. Yes, sir; the Union Sewer Pipe Company was a benefit to all dealers because of that fact that orders could be filled more promptly; possibly a great deal.

Q. How was this brought about?

A. If one company did not have the necessary fittings the other company could furnish fittings for this company, and it did not necessitate the individual companies carrying so heavy a stock. By having the several companies under contract, each individual company was not compelled to carry quite so heavy a stock on that account.

Q. How much saving was there to the National Sewer Pipe Company as regards office help and salesmen?

(Objected to as immaterial.)

A. Well, we saved expense of about two traveling men and probably one or three in the office.

Q. State whether or not one of the chief objects of the entering into of these contracts on the part of the individual companies with the Union Sewer Pipe Company was the reduction of expenses?

(Objected to as leading and otherwise incompetent.)

A. The chief object was to reduce expenses.

Q. What led to the cessation of business on the part of the Union Sewer Pipe Company?

A. Well, the outside competition became pretty strong and caused the Union Sewer Pipe Company to pay to the individual companies a less price for their product. The billing prices were reduced
355 and they felt more like withdrawing and cancelling their contract with the Union Sewer Pipe Company.

Q. Then, am I to understand you to say that the fear on the part of the officers of the companies holding these contracts with the Union Sewer Pipe Company that they would be obliged to do business at a loss is one of the substantial reasons for the cessation of its business?

(Objected to as leading.)

A. That was the principal reason that the National Sewer Pipe Company desired to cancel their contract.

Q. Will you state whether or not the trouble which arose between Mr. D. E. Hill with the other officers and directors of the Union Sewer Pipe Company or the threatened proceedings on the part of the attorney general which grew out of that trouble was or was not one of the causes for the cessation of business by the Union Company?

(Objected to on the ground that it is incompetent, irrelevant, and immaterial.)

A. I think that had nothing to do with it.

Q. After the preliminary hearing before the attorney general at that time, state whether or not the business was continued by the Union Sewer Pipe Company.

A. It was.

Q. How long was business continued?

A. My recollection is, about three months.

Q. Was the legality of the organization of the Union Sewer Pipe Company ever questioned by any one except David E. Hill?

(Objected to as irrelevant, incompetent, and immaterial.)

A. Not to my knowledge.

Q. Is it not true that that Hill trouble was really an internal row among the officers and directors of the Union Sewer Pipe Company?

(Objected to as leading and incompetent, irrelevant, and immaterial.)

A. I think that was brought about by something of the sort.

Q. Do you know that it was?

(Objected to as immaterial and irrelevant.)

A. Yes, sir; it was.

Q. Were any other arrangements similar to that of the Union Sewer Pipe Company with the individual companies made in the State of Ohio beginning with the year 1893?

A. I don't know as there was.

Q. Were there not some companies who made arrangements substantially similar?

(Objected to as leading.)

A. There was in Pennsylvania.

Q. What was the name of that company?

A. The Central Sewer Pipe Company. I don't know but what that was incorporated under the Ohio laws.

Q. Were there any other organizations similar to the Union Sewer Pipe Company during this time?

(Objected to as immaterial.)

A. Yes, sir. I think there was one in New York State, with headquarters at Rochester.

Q. What was the Columbia Sewer Pipe Company?

A. It was an incorporated company and had contracts with the individual companies similar to the Union contracts.

Q. In what State was that company incorporated?

A. In Ohio, I believe.

Q. During what time did it have its existence?

A. From—I believe during 1892.

357 Q. What was the American Sewer Pipe Company?

(Objected to as immaterial.)

A. I presume that was a company similar to the Union Sewer Pipe Company. That was before my sewer-pipe experience. I believe they had similar contracts with each manufactory, and operated for several years.

Q. State whether or not arrangements of this description between these corporations and other individual corporations had not been a common factor in the sewer-pipe business in and about the State of Ohio in the past?

A. Yes, sir.

Q. Do you know anything with respect to any local combination existing in the city of Chicago among the dealers there in which the defendants Dee and Connelly were interested?

A. I know they had an agreement.

Q. State whether or not Thomas Connelly was a prominent member in these arrangements.

A. Yes, sir.

358 Q. What proportion of the business in the Chicago market did these persons control?

A. They controlled about two-thirds of the business.

Q. Previous to the formation of the Union Sewer Pipe Company was there any direct competition with Dee and Connelly on the part of the Akron manufacturers?

A. Yes, sir.

Q. Did they sell directly to the consumers of pipe in the Chicago market?

(Objected to as immaterial.)

A. Yes, sir.

Q. How extensive were the shipments?

A. Pretty extensive. I don't know just how much.

Q. Were they a prominent factor or not in competition against Dee and Connelly?

(Objected to as immaterial.)

A. It affected Dee and Connelly a good deal; yes, sir.

Q. What was the result of the contractual relations between the individual companies in and about Akron with the Union Sewer Pipe Company as regards this competition?

A. It shut off some of the competition.

359 Q. It shut off all competition from the Akron locality?

A. Yes, sir; I think it did.

Q. How did this affect Dee and Connelly?

(Objected to as incompetent.)

A. It benefited them.

Q. Did you ever have any conversation with William E. Dee or Thomas Connelly with reference to the Union Sewer Pipe Company?

(Objected to as incompetent, irrelevant, and immaterial.)

A. Why, I should say I did. I don't know of any specific time or special time just now. There is no question but what we had a great many talks on that subject.

Q. How frequently was that during the years 1893 and 1896?

A. Possibly two or three times a year.

A. As I said before, I have no doubt but what we have discussed it, and I am sure that they were pleased with the Union Sewer Pipe Company.

Q. Why do you think they were pleased?

(Objected to as immaterial.)

A. Because it was useful to them in shutting out competition.

360 (Answer objected to, especially what he says of Williams.)

Q. Do you remember a dispute which arose between the Union Sewer Pipe Company and William E. Dee relative to the filling of an order claimed to have been given by William E. Dee to Camp & Thompson just prior to the formation of the Union Sewer Pipe Company?

A. Yes; I think there was such a contract or order given to Camp & Thompson. My impression is that the Union Sewer Pipe Company assumed that contract or took that order with the intention of filling it.

Q. What kind of pipe did Camp & Thompson contract with William E. Dee to furnish?

A. If I remember correctly, so many cars of ring-and-socket pipe.

—. Of what make?

A. Of their make.

Q. Whose make?

A. Camp & Thompson.

Q. State whether or not the Union Sewer Pipe Company offered to fill this contract after the same was turned over to them by Camp & Thompson.

(Objected to on the ground that the witness has no means of knowing.)

A. My impression is that they did offer to fill it. I am not so sure but what they did fill it.

Q. State whether or not it is a fact that the pipe demanded by William E. Dee at this time was of the National Sewer Pipe Company's pipe under this contract.

(Objected to on the ground that the witness does not know what the contract was.)

361–368 A. Well, I don't remember whether he demanded the National. My impression is that on account of the inspection in Chicago there was something said about furnishing other makes of pipe than Camp & Thompson's

Q. But the pipe originally contracted for was Camp & Thompson's?

A. Yes, sir.

* * * * * * *

369 Redirect examination by Mr. HAMLIN:

Q. What did I understand you to say *what* the usual phraseology of specifications in the Chicago market as to kind of pipe to be used?

A. I don't know as I ever saw Chicago specifications. Most of the specifications called for Akron standard pipe.

Mr. SANDER:

Q. I suppose all call for Akron pipe or its equal?

A. Yes, sir.

Mr. HAMLIN:

Q. Is it not a fact that during the last five or six years other makes of pipe than Akron pipe had been creeping into the Chicago market and established a strong foothold there?

(Objected to as leading.)

A. Yes, sir; other pipes have gotten into the Chicago market and are being used there.

Q. How does the popularity of these other pipes compare with that of Akron pipe in the Chicago market?

A. I don't think that the Chicago authorities liked the outside pipe quite as well as they did the Akron pipe.

Q. But these other makes of pipe have established a considerable foothold in that market?

A. O, yes; a good deal has been used there. One reason that Akron pipe was generally called for was there was so many of us here that could furnish pipe promptly, and agents liked to get it from large factories where they could get it promptly.

Q. What has been the tendency during the last five or six years in the Chicago market as to other pipes in respect to their being able to compete with Akron pipe?

A. Well, they could compete with Akron pipe.

Q. State whether or not their ability in this respect has been increasing during the last five or six years.

370–385 A. I think it was.

Q. State whether or not this fact is well known.

A. Yes, sir; it is well known.

Q. Is it true or is it not that during the last three or four years other pipes have been able without difficulty to get into the Chicago market?

(Objected to as hearsay.)

A. Yes, sir; I think they have.

Q. You have been shown a telegram sent by you on March 17, 1896, and also a circular sent out by the National Sewer Pipe Company one week before that date. What became of the controversy mentioned in that circular?

A. I think that the proceedings at Columbus were withdrawn or settled in some way, and the stockholders of the Union decided to continue the business.

Q. Am I to understand you to say that the trouble between David E. Hill and the other directors of the company was adjusted?

(Objected to as leading.)

A. I think it was.

Q. State whether or not it is a fact that upon the adjustment of this dissension all proceedings on the part of the attorney general were dropped.

A. I think they were.

Q. Then, is it a fact that the trouble referred to in the circular which I have mentioned blew over?

A. Yes, sir.

Q. State whether or not it is a fact that the telegram of March 17, 1896, was sent just after the preliminary hearing before the attorney general.

(Objected to as leading and otherwise incompetent.)

A. It was sent about that time; probably after.

386–396 Mr. McFee reads the deposition of DAVID E. HILL, on page 12 of which is contained the following stipulation:

"All questions to follow which have any bearing upon the question as to whether the Union Sewer Pipe Company has infringed any statute of Federal law prohibiting illegal combinations or trusts or has violated the common law prohibiting such combinations and all documentary evidence relating to the same are objected to by the plaintiff on the ground that this issue is not an issue in the case and is wholly irrelevant, incompetent, and immaterial."

Mr. WALKER: I ask that the objection here made shall go to all the questions without repetition.

Said motion is allowed; but the objections contained in the above stipulation were overruled, and exception by the plaintiff.

* * * * * * *

397 This memorandum of agreement, entered into this — day of —— A. D. 189–, by and between —— —— of —— in the county of —— and State of ——, the first party, and the Union Sewer Pipe Company, the second party, a corporation duly organized under the laws of the State of Ohio, the legal organization and existence of which is hereby recognized and admitted by said first party, witnesseth:

Article first. That in consideration of the mutual promises and stipulations hereinafter mentioned, said first party hereby agrees to sell, and does sell to said second party all the sewer pipe which said first party may have on hand, in stock, of good merchantable quality, according to the several grades, at said first party's sewer-pipe works, on the 15th day of February, A. D. 1893, and to deliver to said second party, an inventory of the same on or before the 15th day of February A. D. 1893, and to deliver said pipe on the orders of said second party, as provided in the third article hereof, the correctness of said inventory to be determined by said deliveries, and the said second party agrees to purchase the same and to pay therefor as hereinafter provided.

Article second. The said first party hereby agrees to manufacture for and by this contract does sell to said second party all the sewer pipe said first party may make or which may be made at said first party's works from the 15th day of February, 1893, to the 31st day of December, 1900, both days inclusive. It also agrees to make and keep in stock at its said works a good and sufficient supply of socket and ring pipe of the various kinds and sizes specified in the price-list set out in article thirteen hereof, with the proper fittings, and to promptly fill all orders of said second party and to deliver said pipe without delay to said second party f. o. b. cars at the sewer-pipe works of said first party. Said first party further agrees to brand plainly with its name all pipe of interior diameters of six inches or larger manufactured by it.

Article third. Said first party also agrees to deliver f. o. b. cars as provided in second article hereof to said second party all the pipe hereby contracted for at such times, in such manner, in such quantities, of such sizes and quality, and with such fittings, as
398 may be ordered by said second party of all kinds and sizes mentioned in the second article hereof, and in like manner to deliver the pipe mentioned in the first article hereof.

Article fourth. Said first party agrees that all pipe delivered under this contract shall be first-class, merchantable pipe, unless second-class pipe is ordered, by the second party. And, if it shall appear that defective pipe, or other kinds different in quality from that ordered by the second party, shall have been delivered and rejected by the purchasers or consignees of said second party, or if there shall be any breakage in transit, or shortage from other cause, any loss thereby accruing to said second party shall be charged back to and sustained by said first party.

Article fifth. In consideration of the foregoing said second party agrees to order said pipe as fast, in such manner, at such times, of

such sizes and quality as the demands of the market may require, but,

(Whereas, the said second party has entered and may hereafter enter into contracts with other manufactorers of sewer pipe for the purchase of sewer pipe, all of whom, together with said first party, are located in Ohio and are hereinafter called "manufacturers") the said second party in its orders and arrangements for the delivery of pipe aforesaid shall in good faith and as far as practicable in a business way, act and be governed as follows, to wit: Beginning February 15, 1893, said first party each succeeding month until July 1, 1893, shall as near as practicable, be given such per cent. of the aggregate amount of orders placed by said second party in that respective month as the product of said first party for the month immediately preceding is of the aggregate product of said manufacturers for said preceding month; said first party shall, as near as practicable, be given such per cent. of the aggregate amount of orders placed by said second party in the six months beginning July 1, 1893, and ending December 31, 1893, both inclusive, as the product of said first party on hand February 15, 1893, and manufactured during the four and a half months beginning February 15, 1893, and ending June 30, 1893, both inclusive, is of the aggregate product of said manufacturers on hand February 15, 1893, and manufactured during said four and a half months ending June 30, 1893; said first party, in
399 the six months beginning January 1, 1894, and ending June 30, 1894, shall, as near as practicable, be given such per cent. of the aggregate amount of orders placed by said second party in said six months as th product of said first party for the six months beginning July 1, 1893, and ending December 31, 1893, is of the aggregate product of said manufacturers for said six months; said first party in the six months beginning July 1, 1894, and ending December 31, 1894, shall, as near as practicable, be given such per cent. of the aggregate amount of orders placed by said second party in said six months as the product of said first party for the six months beginning January 1, 1894, and ending June 30, 1894, is of the aggregate product of said manufacturers for said six months; for the remaining period of time covered by this contract said first party shall be given such per cent. of the aggregate amount of orders placed by said second party for said remaining period as the product of said first party for the last six months of 1894 is of the aggregate product of said manufacturers for said six months.

If by reason of fire, strikes or other manufacturing contingencies the product of said first party for the six months from June 30, 1894, to December 31, 1894, shall fall below its product for any consecutive six months commencing with any January or July covered by this contract, prior to Jan'y 1, 1895, then said first party shall have the privilege of selecting the product of such other six months as the basis of its apportionment of orders for the six years commencing January 1, 1895.

In placing said orders the same shall be placed upon the basis of an equitable apportionment as to amount, size and fittings and said

apportionment shall be based upon the gross western list price for such goods as given in article thirteen hereof.

Article sixth. If at the end of any business year, which shall be the thirty-first day of December it shall appear that the first party has been unable, refused or failed to fill orders as required by this contract, said first party shall pay to the said second party the profits as estimated by second party that would have accrued to the second party on the pipe covered by the orders, not filled by first party, if said first party had filled said orders. If, however, at the end of any business year it shall appear that the second party shall have been compelled to order, and shall have ordered of the first party, pipe in excess of its apportionment, as mentioned in article fifth of this contract, the said second party agrees to pay to the said first party such reasonable profit on such excess so ordered and delivered as it may deem equitable.

Article seventh. Said second party agrees to pay said first party for all pipe delivered under this contract as follows: For first-class socket pipe of interior diameters from two to twenty inches inclusive in one-foot and two-feet lengths at the rate of 12½ % of said western list price; for first-class ring pipe of interior diameters of from two to nine inches inclusive at the rate of 12½ % of said western list prices; for first-class ring pipe of interior diameters of from twelve to twenty-four inches inclusive at the rate of 15 % of said western list prices; for first-class socket pipe of interior diameters of twenty-four inches at the rate of 15 % of said western list prices; for first-class three-feet socket pipe at the rate of 15 % of said western list prices; and for second-class pipe at the rate of 8 % of said western list prices. And the second party agrees to settle and pay monthly, on or before the 10th day of each month, for all pipe actually delivered during the previous month in the negotiable notes of said second party payable to said first party ninety days after the date thereof. And in addition to the prices above specified said second party further agrees to pay in cash to said first party such a share of any excess that may remain after deducting from the amount realized by said second party for said sewer pipe, the prices above specified and all expense of managing and conducting the affairs and business of said second party, as the amount of sewer pipe delivered by said first party to said second party under this contract shall bear to the whole amount of sewer pipe delivered to said second party by all the manufacturers of sewer pipe under contracts with said second party similar to this contract; the additional price above provided for may be paid from time to time, but the entire available amount thereof remaining unpaid shall be paid by the second party to the first party semi-annually on the third Wednesday of January and July in each year, and at the expiration of this contract the whole of said additional price remaining unpaid shall be paid by said second party to said first party within one year from the third Wednesday of July, 1901. No pipe shall be taken to be second-class except such as the second party shall consider merchantable second-class pipe.

401 Article eighth. It is mutually agreed by the parties hereto, that if at the expiration of any three months from the date hereof said first party shall give notice in writing to the said second party that it has in stock a larger amount of such pipe manufactured by it than it desires to carry, and for which excess it wishes to receive payment in advance of orders from said second party, said second party shall cause an accurate invoice of said pipe to be taken, and said pipe so invoiced shall be carefully piled and stored separately from other pipe then and there being, by said first party, and without cost to said second party, and to be further delivered upon the orders of said second party, as provided in the third article of this contract; and for such pipe so stored and invoiced, said first party shall be paid in full at the following rates: For first-class socket pipe of interior diameters of from two to twenty inches inclusive in one-foot and two-feet lengths at the rate of 6¼ % of said western list prices; for first-class ring pipe of interior diameters of from two to nine inches inclusive at the rate of 6¼ % of said western list prices; for first-class ring pipe of interior diameters of from twelve to twenty-four inches inclusive at the rate of 7½ % of said western list prices; for first-class socket pipe of interior diameters of twenty-four inches at the rate of 7½ % of western list prices; for first-class three-feet socket pipe at the rate of 7½ % of said western list prices; and 4 % of said western list prices for such pipe as the second party may accept as second-class; said full payment shall be made in the promissory notes of said second party, payable in ninety days after the date thereof.

Article ninth. This contract is made with the understanding, that similar contracts have been and may hereafter be made with other manufacturers of sewer pipe, and that this contract is to be performed with an equitable reference thereto, and that the second party will furnish monthly statements to the first party of the amount of pipe delivered under this and all other contracts that have been or may hereafter be made with said other manufacturers of sewer pipe.

Article tenth. It is further agreed that the second party may from time to time fix such standard of size and thickness for the different kinds of pipe to be made for said second party as in its judg-
402 ment will best subserve its interests, and to which standard all pipe made for the second party by the said first party shall conform.

Article eleventh. Whenever the exigencies of the market demand it the second party may order of said first party sizes and kinds of pipe not specified in this contract, and if such orders be accepted by said first party, the said pipe so ordered and delivered shall apply on the apportionment of said first party as per article fifth, and shall be paid for by the said second party in the same manner that other pipe is paid for, and at such price as may be agreed upon between the parties.

Article twelfth. Said second party further agrees to sell to said first party all pipe which may be on hand at the works of said first party on the 31st day of December, 1900, at and for the prices and

upon the terms agreed to be paid therefor by second party to said first party in article seven hereof, and said first party agrees to purchase said pipe and pay for the same at said prices and upon said terms.

Article thirteenth.

*Western Sewer-pipe Price-list.*

| Caliber of pipe. | Price per foot. | Branches per foot. | Curves and elbows each. | Slants per foot, long side. | Traps in two pieces. | Traps in two pieces. | Traps with hand hole. |
|---|---|---|---|---|---|---|---|
| 2 in. | .12 | .25 | .40 | ..... | ..... | 1.00 | |
| 3 " | .15 | .30 | .50 | ..... | ..... | 1.20 | 1.70 |
| 4 " | .20 | .40 | .60 | ..... | ..... | 1.60 | 2.10 |
| 5 " | .25 | .50 | .75 | ..... | 1.50 | 2.00 | 2.50 |
| 6 " | .30 | .60 | 1.00 | .45 | 2.00 | 2.40 | 2.90 |
| 8 " | .40 | .80 | 1.50 | .60 | 3.00 | 3.20 | 3.70 |
| 9 " | .50 | 1.00 | 1.75 | .75 | 3.50 | 4.00 | 4.50 |
| 10 " | .60 | 1.20 | 2.10 | .90 | 4.50 | 5.00 | 5.50 |
| 12 " | .75 | 1.50 | 2.75 | 1.15 | 6.00 | 8.00 | 8.50 |
| 15 " | 1.00 | 2.00 | 3.75 | 1.50 | 8.00 | 10.00 | 10.50 |
| 18 " | 1.50 | 3.00 | 4.75 | 2.25 | | | |
| 20 " | 1.75 | 3.50 | 5.75 | 2.65 | | | |
| 24 " | 2.50 | 5.00 | 8.00 | 3.75 | | | |

☞ Reducers and increasers once and a half the price of large end per foot.

403–416 Article fourteenth. If any controversy at any time shall arise between the parties hereto which they are unable to adjust amicably, the same shall be submitted to the arbitration of three disinterested persons, one of whom shall be selected by the first party, one by the second party, and the third by the other two arbitrators, who shall hear and determine the whole matter; the determination of any arbitrators shall be a complete and final adjudication of the controversy and forever binding upon both of the said parties.

In witness whereof the parties hereto have caused this instrument to be executed by their proper officers, duly authorized in the premises, this 15th day of February, A. D. 1893.

—— ——.

(On the back:) Contract with the Union Sewer Pipe Co. Date, ——: expires ——.

* * * * * * *

417–430 The deposition of JOSEPH A. BALDWIN was then read by Mr. Lantry down to the stipulation on that page contained:

Mr. HAMLIN: The same general objection is made. The following stipulation also appears: "It is hereby stipulated that the

objections above made may be considered as repeated to each and every question on this line of examination without specifically noting it after every question."

Mr. COGHLAN: I understand the objection to be saved to all these witnesses?

The COURT: It is the same objection?

Mr. COGH-AN: Yes, sir.

431 Defendant's counsel thereupon offered to read the deposition of FRANK S. MONNETT, which plaintiff moved to exclude.

Mr. WALKER: He was the attorney general of the State of Ohio.

Mr. COGHLAN: And is.

Mr. WALKER: We think your honor ought to know it. They have had an election since they commenced this suit.

Mr. COGHLAN: And he is still in.

The COURT: So far as it pertains to that matter it should not go in.

Mr. McFEE: Your honor, it is not very long; I will say that. It is admissible, because it does not deal only with that proceeding, but Attorney General Monnett made an investigation of this company and he undertakes to tell what he discovered and what he knows. It is not only a statement of what took place in this trial before him and Governor Bushnell, but it also undertakes to give the result of very vigorous investigation on his part.

Mr. COGHLAN: And admissions of the various officers of the Union Sewer Pipe Company.

The COURT: You could not get admissions in without laying the foundation—that is, as statements on the part of a third party.

Mr. McFEE: Your honor, I do not see how a corporation could ever be bound by any act of its officers within the scope of their authority if its officers within the scope of their authority could not bind that corporation by statements or admissions concerning its very corporate existence. Now, here Attorney General Monnett——

432 The COURT: In regard to Mr. Walker's point, so far as it relates to their dealings down there at Columbus with the State officials, why I excluded this yesterday and this morning, and it ought to be excluded now. If it, however, goes to other matters—have you examined it, Mr. Walker, as to that?

Mr. WALKER: I have, your honor. I know what it is, and I am very much surprised that the learned counsel should state openly to this court that your honor should receive as evidence the opinion of any officer of the State of Ohio as to the organization of the company or as to its method of business. He don't make the law, nor he could not make the law if he undertook to make it; and, more than that, counsel is wrong in his statement when he says that Mr. Monnett made a very careful and thorough investigation. He testifies to nothing of the kind.

Mr. McFEE: He says, "In the discharge of my official duties."

Mr. WALKER: He heard the statement of Mr. Hill and he formed

an opinion of what was said by him and by lawyers who were present at that time, and I doubt whether this court could reach a conclusion on the statements of the lawyers made in that case.

Mr. McFEE: They had the very eminent Mr. Kline, who Mr. Walker knows better than I do; the great trust attorney of this country, the Standard Oil attorney, was there.

Mr. WALKER: Mr. Hanecy is now a candidate for office, and goes about the country making speeches for trusts.

Mr. McFEE: Are you talking about Mr. Monnett?

Mr. WALKER: No, sir; I am talking about Judge Hanecy.

433 The COURT (examining said deposition): I am sure, gentlemen, it is only relatively that you may call this short.

Mr. McFEE: I just call your honor's attention to this particular feature of the deposition. You will remember that the answer was filed and this suit was lost. Now, Attorney General Monnett was a lawyer, of course, and he examined that answer. His testimony as to its contents would be competent, and also his testimony as to the law of Ohio, which is a material fact in this case, would be competent. It is competent evidence to show that this contract under the law of Ohio is void, and that this organization is a trust.

The COURT: His opinion as attorney general?

Mr. McFEE: Why not? His opinion as a lawyer. I do not know of any better way to prove the law of a State than by the opinion of its lawyers.

The COURT: I cannot see. There may be some one or two competent questions in here, Mr. Walker. I don't know whether you know.

Mr. WALKER: I don't know that there is one.

Mr. COGHLAN: Mr. Walker has not seen any competent questions in any of these depositions.

Mr. WALKER: There are very few in any of them.

Mr. HAMLIN: The common law of the State of Illinois is not binding upon the State of Ohio, and I do not see how they can find any testimony on that basis.

The COURT: The motion to exclude is allowed.

To which ruling of the court in excluding said deposition the defendants, by their counsel, then and there duly excepted.

434–459 Mr. McFEE: I object to the exclusion of this deposition and I offer the deposition for the further reason that it is evidence of an expert in the law of Ohio concerning the general law of Ohio, aside from the statutes as to trusts, and I except to your honor's ruling as to that.

460–478 I, Noah O. Foust, of the county of Summit and State of Ohio, a notary public and commissioner duly appointed to take the depositions of the said Byron W. Robinson, David E. Hill, Joseph A. Baldwin, Horace B. Camp, Charles Baird, E. M. Buel, Henry B. Sperry, Ira P. Sperry, Frank W. Rockwell, and Harry Thompson, do hereby certify, previous to the commencement of the examination of said persons as witnesses in the suit between the said Union Sewer Pipe Company, plaintiff, and the said Thomas Con-

nelly, defendant, that they were duly sworn by me to testify the truth in relation to the matters in controversy between the said The Union Sewer Pipe Company, plaintiff, and the said Thomas Connelly, defendant, so far as they should be interrogated concerning the same; that the said depositions were taken at my office, room 35, Savings Bank building, in the city of Akron, county of Summit and State of Ohio, on the 3rd, 4th, 6th, 7th, and 8th days of June, A. D. 1898, as appears in the record; that said depositions were taken by me in shorthand by agreement of counsel in said cause, and that the signatures of the several witnesses to the same were by agreement of counsel waived, and that the above and foregoing is a true and correct transcript of the testimony of each and all of said witnesses.

(Signed) NOAH O. FOUST,
*Commissioner.*

479 HENRY J. MCNICHOLS, a witness called on behalf of the defendant, being first duly sworn, was examined in chief by Mr. Coghlan and testified as follows:

Mr. COGHLAN:

Q. State your name.
A. Henry J. McNichols.
Q. What is your business, Mr. McNichols?
A. Mason and contractor.
Q. Where do you reside?
A. 65 Lowell place, Chicago.
Q. I will ask you how long you have been engaged in the business of mason and contractor.
A. 25 years.
Q. What is the name or style of your firm, or what was it?
A. It was the firm of Martin & McNichols, then Henry J. McNichols.
Q. Are you in business at the present time?
A. No, sir; I am in business, but I am all through my work.
Q. When did you cease doing business as Martin & McNichols?
A. In the fall of 1892 or the spring of 1893.
Q. What business did the firm of Martin & McNichols do?
A. General sewer business.
Q. For how many years?
A. 11 years.
Q. Who succeeded that firm.
A. Henry J. McNichols.
Q. What did Henry J. McNichols do?
A. Sewer business.
Q. How many years did Henry J. McNichols continue in the sewer business?
A. As contractor two years.
Q. What time did you stop?
A. Stopped in 1893 as the firm of Martin & McNichols and went in contract—and went into contract work in 1897 and 1899.

Q. What, if any, position did you hold with the city of Chicago?

A. Chief sewerage inspector.

480 Q. What years did you hold the position of chief sewerage inspector?

A. 1893 and 1895, 1896, and part of 1897.

Q. Well, you mean 1893, 1894, and 1895?

A. No; 1893, part of 1894, 1895, 1896, and part of 1897.

Q. Are you generally acquainted with the sewer-pipe business?

A. Yes, sir.

Q. Are you acquainted with the different grades and different kinds of sewer pipe?

A. Yes, sir.

Q. Do you know what Akron pipe is?

A. Yes, sir.

Q. What standard Akron pipe is?

A. Yes, sir.

Q. Do you know what pipe is manufactured by the Columbia Sewer Pipe Company?

A. Yes, sir.

Q. Do you know what kind of pipe is manufactured at Red Wing?

A. Yes, sir.

Q. Do you know the kind of pipe that is manufactured through Illinois and Indiana?

A. I know of some.

Q. You are generally acquainted with the different kinds of sewer pipe that is manufactured in the United States?

A. Well, I would have to answer that in another way: "That has been used in the Chicago market?"

Q. Yes, sir; that has been used in the Chicago market.

A. I am; yes.

Q. Now, I will ask you what kind of sewer pipe was used in the Chicago market during the years 1893, 1894, 1895?

A. The Akron pipe.

Q. Was there any other kind of pipe used in municipal contracts in the city of Chicago during those years?

A. Not to my knowledge.

481 Q. No. During the years that you were inspector, chief sewerage inspector, did you say?

A. Yes, sir.

Q. Of the city of Chicago, was there any other pipe than standard Akron pipe used in the contracts of the city of Chicago?

A. There was not.

Q. Why was there not?

Mr. WALKER: Wait a moment. Well, you may go on.

Mr. COGHLAN:

Q. Go ahead.

A. Because the city of Chicago would not allow them to be used.

Q. What was their objections?

A. Because they could not come up to the standard of their specifications.

Q. That is, the standard Akron pipe?

A. The other pipe would not come up to the specifications.

Q. Now, during the years that you acted as inspect*ed* of the city of Chicago, how many miles of sewer did you see laid—sewer pipe, rather?

A. Oh, I could not answer that.

Q. About how many?

A. Oh, I saw sixty or seventy miles, all told.

Mr. WALKER:

Q. How much?

Mr. COGHLAN: Sixty or seventy miles.

Q. During that time did you ever see any other pipe but standard Akron pipe used in the streets of the city of Chicago?

A. No, sir.

Q. Did you ever see any attempt made to use any other pipe?

A. Yes, sir.

Q. Just tell the jury when and where.

Mr. WALKER: I object.

Mr. COGHLAN:

Q. And what kind of pipe they attempted to use?

182 Mr. WALKER: To that I object.

Which objection was by the court sustained, and to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. COGHLAN:

Q. Now, during the years that you acted as an independent contractor on your own account how much sewer pipe did you lay? Can you approximate that?

Mr. WALKER: Does that precede 1893?

Mr. COGHLAN: Yes, sir.

Mr. WALKER: Then I object to that.

Mr. COGHLAN: Well, then, I withdraw the question. It simply goes to his experience.

Mr. WALKER: He must have had very great experience or he could not have held his position.

Mr. COGHLAN: Very well, then, I withdraw the question.

Q. Mr. McNichols, what was the first time that any other pipe other than standard Akron pipe came in and was used in municipal contracts in the city of Chicago?

A. It was about May; it was between May and June of 1896.

Q. What was the occasion for it then, if you know?

Mr. WALKER: To that I object.

The COURT: Objection sustained.

Mr. COGHLAN: All right; that is all. Exception.

To which ruling of the court in sustaining said objection the defendant, by his counsel, then and there duly excepted.

483 Cross-examination.

Mr. WALKER:

Q. Mr. McNichols, so you were chief inspector of sewer pipe?

A. Of sewers.

Q. You were the chief inspector?

A. Yes, sir.

Q. How many men had you under you?

A. Oh, at times I have had ten—well, I have had from five to twenty-two, about.

Q. What were the special duties of your office?

A. To go from one job to the other, see that the material was up to the specifications, keep the time of the inspectors.

Q. What did the ten men under you do?

A. They were locals.

Q. How?

A. They were local inspectors.

Q. And did the same kind of work under you?

A. They were mason inspectors; yes, sir.

Q. So, you did not undertake to inspect all the pipe that was laid or all the pipe that was put in under contracts with the city; a part of the work you had to leave to your subordinates?

A. Why, no; I would go over all and examine. I would go right along in my line and examine the brick and the pipe. About the cement was the only thing that I would not pay any attention to.

Q. Then the ten men, they had but very little to do?

A. Yes, sir; they had to see that the work was prosecuted right.

Q. Oh, prosecuted right. What do you mean by standard Akron pipe?

A. I mean it must be smooth, hard-burned, well-vitrified pipe, straight, with the cylinder. It must be standard thickness.

484 Each sized pipe would have a standard thickness and be free from all imperfections.

Q. Supposing that the pipe having all those good qualities was made up at Columbus, Ohio?

A. At that time they didn't show any in the market.

Q. If it was made there, would it be rejected?

A. I believe so.

Q. You believe so?

A. I am sure it would.

Q. How do you know that all the pipe that was laid came from Akron mills?

A. From the pipe I saw. I can tell them.

Q. What particular good qualities of the Akron pipe led you to reject everything else?

A. Well, the pipe was straight, smooth-bored, had the requirements, and the thickness.

Q. What requirements, the specifications?
A. The requirements that the specifications call for.
Q. Well, you could not depart from those specifications, I apprehend?
A. I did not.
Q. You did not; no. Then, the specifications did or did not call for standard Akron pipe?
A. They called for standard pipe.
Q. All the time, standard pipe?
A. Standard pipe.
Q. Standard pipe had a definite meaning?
A. Yes, sir.
Q. And anything—any pipe, wherever made—that came up to those specifications of standard pipe would be received by you?
A. There was none; could not get them——
Q. I am not asking that, sir; supposing there was?

Mr. COGHLAN: Well, that is purely speculative. That is not cross-examination.

485 Mr. WALKER: I have got the witness.
Mr. COGHLAN: I have the right to object if you have.

Mr. WALKER:

Q. I ask you if a contractor should furnish pipe and lay pipe conforming to the specifications in quality, size, and all other good points to make it standard pipe, would you reject it if it was not made at Akron?

(Objected to.)

A. Yes, sir.
Q. You would reject it, would you?
A. Yes, sir.
Q. Because it was not made in Akron?
A. That would not be my reason.
Q. It would be your reason?
A. It would not be my reason.
Q. What would be your reason?
A. My reason would be because my instructions was to receive nothing but standard Akron pipe.
Q. You said the specifications called for standard pipe?
A. Well, I didn't get my instructions from the specifications.
Q. Now, I want to ask you this question, sir: Is it so, as you state, that the city of Chicago during all those years used nothing except pipe made at Akron, Ohio?
A. To my personal knowledge.
Q. And about how many miles of pipe were laid?
A. In how long a time?
Q. In the entire city during the time that you were in charge of the work.
A. Oh, it was all of 200 miles.
Q. Two hundred miles; would that cover it?

A. That covered it

Q. And then, under your statement, the 200 miles of pipe during those three years made at Akron and furnished by the manu-

486 facturers of Akron——

A. I did not say there was 200 miles of pipe sewers. You know there are brick sewers as well as pipe sewers.

Q. There is what?

A. Brick sewers as well as pipe.

Q. How much pipe?

A. There would be about half of that.

Q. You mean there was about 100 miles of pipe sewers?

A. Yes, sir.

Q. And you mean to say now to the jury that the hundred miles of pipe sewers laid in those three years came from Akron and were made by Akron manufacturers?

A. I did not say in three years.

Q. How many years?

A. While I was in business. That is what I meant.

Q. From 1893 to 1896, how many miles of pipe—of sewer pipe—were laid in the city?

A. I would not say. There was only 75 miles to my knowledge.

Q. Would that be your estimate?

A. Yes, sir; that would be my estimate.

Q. 75 miles?

A. Yes, sir.

Q. Now, is this your statement—that that entire 75 miles during those three years from 1893 to 1896 came from Akron and were manufactured in Akron?

A. To my knowledge, yes, sir; to the best of my information.

Q. Well, you say to your knowledge. Then you mean that you know it?

A. Yes, sir.

Q. When was that Columbus pipe introduced?

A. Oh, I remember the Columbus pipe since 1892 or 1893, and 1892 and 1891, — I may go back that far.

Q. Was there any Columbus pipe used or a large quantity of Columbus pipe used between and during the years 1893 and 1894, 1895, and 1896?

A. No, sir.

487 WILLIAM E. DEE, a witness called on behalf of the defendants, being first duly sworn, was examined in chief by Mr. McFee, and testified as follows:

Mr. McFEE:

Q. What is your name?

A. William E. Dee.

Q. You are one of the defendants in this case, or, rather, a defendant in one of these cases?

A. Yes, sir.

Q. What is your business, Mr. Dee?

A. I am a dealer in sewer pipe at present, and also a contractor.
Q. You reside in Chicago?
A. Yes, sir.
Q. A citizen of the State of Illinois?
A. Yes, sir.
Q. How long have you been in the sewer-pipe business?
A. Well, I have been in the sewer-pipe business all my life—that is, when I was able to get into it.
Q. You were not in business on your own account all your life, were you?
A. No, sir. My father was in it previous to me.
Q. When did your father die?
A. He died in December, 1892.
Q. How long had you been associated with your father prior to his death?
A. Well, I was associated with him before he died in business, but afterwards I was contracting, before he died, and on his death why he turned the business over to me—his business.
Q. Did you succeed to all of his business?
A. Yes, sir. The estate turned it over to me.
Q. At the time you succeeded to your father's business, in 1892, did you succeed to any contracts—contracts for city sewers?
488 A. On my coming into possession of his business I found, in looking up the contracts that he had to fill with different contractors of the city for sewer pipe—I found that he had 308 car-loads of pipe to furnish those contractors at a certain price.
Q. Did you take any steps to get that pipe or to purchase it?
Q. Just about the time that I came into possession of the business there were rumors of a pool on Akron pipe.
Q. Now, before we get to that, I will ask you whether you are familiar with the quality and standard of pipe that was used by the city of Chicago in building its public sewers prior to the first of January, 1896.
A. Yes, sir.
Q. What was that standard and quality?
A. Akron pipe strictly.
Q. Do you know why that was used exclusively?
A. Well, it had been a pipe that had been adopted for years away back in the first starting of the city sewers and at the time Engineer Clarke was city engineer. The standard was adopted then—Akron pipe.
Q. When was that? When was Clarke city engineer?
A. Why, way back as far as 1873, I believe, '4 or '5; somewhere in there.
Q. Was any other pipe used from that time up to 1896 in public sewers?
A. Nothing but Akron pipe, except with one exception, probably. Columbus pipe would get in once in a while to a small amount—a very small amount.
Q. You mean for main sewers only?
489 A. For city main sewers I am talking about.

Q. So that other pipe was used for other purposes?

A. Oh, yes; there was a great demand on other pipe, as there was on city pipe, what was known as city inspected pipe or ring pipe.

Q. What do you mean by city inspected pipe?

A. City inspected pipe is such pipe as the city accepts for its main sewers.

Q. Passes the inspection?

A. Passes inspection of the city.

Q. Have you built any sewers, or is it your business, or was it your business to build sewers?

A. Yes, sir; it was my business to build sewers, too.

Q. When was that your business?

A. It has always been my business.

Q. Did you ever build in the city of Chicago prior to 1896 any sewer of any pipe other than standard Akron pipe?

A. Other than standard Akron pipe?

Q. Yes.

A. I tried to.

Q. Well, tell us about it.

Mr. WALKER: Object.

Mr. McFEE:

Q. What was the result of your trying to do it?

Mr. WALKER: I wish the witness would be confined to some particular date. If it was prior to 1893, I object to it.

Mr. McFEE:

Q. When did you try to?

A. I think I have not got the date exactly correct, but I think it was in the fall—either the spring, I think, or fall of 1895; I won't be sure. It was Judge Lambert Tree's race track, opposite Garfield park.

Q. Garfield Park race track?

A. Yes, sir.

Q. Did you put it in there?

A. Yes, sir.

Q. Did it stay in?

A. No, sir; I had to haul it off again and put Akron pipe in its place.

490 Q. Now, coming down to the time that you had 308 carloads to furnish, tell us what you did about that.

A. Well, I had heard rumors——

Mr. WALKER: We object to that.

Mr. McFEE:

Q. That is not proper, what you heard, you know; just what you know.

The COURT: Did you object to the question?

Mr. WALKER: We object to his going into—I assume that he goes

now into an investigation of the contract of Camp & Thompson. We object to any examination with reference to that contract. I assume that is the effect of the question from the number of cars that counsel names.

Mr. McFEE: We have not got up to that, your honor, but I am willing to meet that point. Your honor has ruled that we are not entitled to offset the loss that we sustain by reason of the breach of the contract with Camp & Thompson by the Union Sewer Pipe Company upon their assuming that contract. That much has passed out of the case, but, your honor, we submit that it is competent evidence showing the nature of this combination, that it is competent evidence showing the nature of the formation of the Union Sewer Pipe Company, that we show that at the time or prior to the time of the formation of this company we had a contract for the supply of 308 car-loads, and that contract was assumed by the Union Sewer Pipe Company, and that after it was assumed the prices were forced down, showing that there was no other way by which we could get the pipe or get the fulfillment of that contract, except through the Union Sewer Pipe Company, and they forced the prices up. I say up and down, because this discount business con-
491 fuses a little. Instead of 80 % they made it 75 %, and instead of pushing the prices up they brought the discount down.

I say that it is relevant testimony to show the formation of this company and the nature of this combination among all the companies at Akron.

Moreover, the depositions introduced here on behalf of this plaintiff already read in evidence in various parts show that they are claiming that they fulfilled that contract. They admit that they had it; they admit that they assumed it, and we are insisting that they fulfill it.

They have filed a declaration in this case in which is set out this written contract, or a written contract, and they claim that they have fulfilled that.

Mr. WALKER: I don't know what contract the counsel refers to, except the contract between the Union Company and Mr. Dee. I understand there was a contract made between those two parties and it was set out in the declaration, and for reasons stated by the counsel that count of the declaration was withdrawn.

Mr. McFEE: What reasons they were I did not state.

Mr. WALKER: Because the account sued on and the goods which were sought to recover for were not embraced in the contract. We do not object to that contract coming in. We do not care to conceal it from the court or jury.

Now, they claim the right to introduce evidence relative to a contract which Mr. Dee had with Camp & Thompson, or his father had in his lifetime, which the counsel says was assumed by the Union Company, and they offer the evidence of those facts for the purpose of satisfying the court and jury that this combination or cor-
492 poration was a simple monopoly. A contract between the Union Company and these constituent companies is in evi-

dence. There were several contracts entered into between that company and these various constituent companies. The provisions of that contract as set out there is no doubt about, if your honor please, for its terms speak for itself.

There is no doubt at all, if your honor please, but what one of the purposes of that combination was to avoid competition among the Akron manufacturers, nor is there any possible doubt under the decisions that that is not only a le*gi*mate matter of business, but is within the law of this State and of every other State.

We are ready to admit about all that they claim that has been accomplished by that contract; but why this other contract between Camp & Thompson and Dee should go in evidence to the jury is a matter that I cannot comprehend. It is not a contract that even tends to show a monopoly, and whether assumed or whether it was not assumed does not show a monopoly or a combination.

If there was violation of that contract, you could have brought your action for that violation and recovered damages long ago.

Mr. McFEE: Then we could have got no pipe. We would have been out of business for five years.

Mr. WALKER: That has been stated over and over again, and yet they claim that this party had a written contract for the delivery of pipe. If he had and no pipe was delivered, then the Union Company would have to respond in damages for a breach of the contract.

493 Mr. McFEE: You forced out of us a written contract to the effect that we could not have any pipe if we did not do as you said.

Mr. WALKER: We are ready to stand on that contract and fulfill the contract that we have made. We are not driven to the necessity of going outside of the lines of legitimate evidence for the purpose of making a defense to a claim that is brought against us for property had and received.

Nor, the fact that the matter of the contract between Dee and Camp & Thompson is outside of the issue, is not material to this case, has already been decided, and the evidence has been rejected, and it is very true that we were required either to read ourselves or to permit counsel for the other side to read evidence touching that contract, not for the purpose of laying a claim of damages, but for the purpose of showing some other fact that they thought material to this issue, — we read the questions as taken.

Now, it is stated broadly that they are to go into the investigation of that contract, opening up the issue as to whether the contract was performed or not performed, an issue outside of the issues in this case, and for no other alleged purpose or reason than to show, as stated by counsel, the workings of this combination—the tendency of this organization, the purposes for which it was organized. I cannot see how it even tends to show that, and I repeat again that the contract itself explains fully the purposes of the organization, and without any witnesses on the stand at all, without any depositions, you have got in that contract and in its clauses all that makes

it a combination, if it is a combination—everything; and if
494 that organization was not lawful and legal, then the parties who entered into it were subjected to the laws of Ohio and not of Illinois.

And here I may state for the benefit of counsel that there was not even a trust law—an anti-trust law—in Ohio until 1898.

Mr. McFEE: We know that, but the common law in reference to trusts held that they were invalid. We are entitled to prove that as a fact. We did offer to prove that by the attorney general.

Mr. COGHLAN: And the same kind of combination was declared illegal in Ohio, the Ohio brickmakers, right at the time that this organization went out of existence.

Mr. McFEE: As the 53rd Ohio states.

Mr. COGHLAN: A fact we say that we stand ready here to show you, if you doubt it.

The COURT: Do the defendants in this case claim that there is any purpose in this corporation or combination, as you call it, other than is disclosed in its corporate articles?

Mr. COGHLAN: Yes, sir; we do.

The COURT: Or in the several contracts with the constituents?

Mr. COGHLAN: Yes, sir.

The COURT: Is there any obscurity in these contracts?

Mr. COGHLAN: None whatever

Mr. McFEE: We are entitled to show what was the result of those contracts; that the necessary results of entering into those contracts was to restrict and destroy competition.

Mr. COGHLAN: And how it did it.

The COURT: Do you claim that the contract itself destroyed competition?

495 Mr. McFEE: Yes, sir; and that was the natural consequence of it from its terms, and from its actual workings that it affected that.

The COURT: But if it itself sets up a monopoly in the contract, why do you offer it further to show its workings?

Mr. McFEE: Because, your honor, if there was a monopoly there aside from the contract we are entitled to show that monopoly as an independent fact. It is one thing for us to show that they entered into this contract to create a monopoly. That is making out our case. We strengthen our case when we show as a fact that there was a monopoly created by this combination, contract or no contract. People don't have to form a monopoly by contract. If they form a monopoly, I don't care whether they form it by contract or tort. They nearly always form it by tort. But if the monopoly was formed by a combination we have a right to show that there was a monopoly existing with this combination, and that that monopoly did not exist before, and that that monopoly died out when the combination died.

Now, one word to show that at that time, that immediately on the formation of this combination, that after it performed that combination it started to raise the prices of pipe because it controlled the output, and insisted on the payment of five per cent. more on the

price of its goods, not five per cent. on the price, but five per cent. discount off of the list price; about 20 % of the price.

The COURT: I think, for the purpose of showing whether this was a monopoly or not, this evidence is competent.

To which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

496 Mr. McFEE:

Q. Then you may state, Mr. Dee, what you did in regard to this 308 car-loads.

A. When I found that I had 308 car-loads to supply to these contractors in the city of Chicago, of main sewers, was under contract to furnish them, which contract I got from the estate of William M. Dee, and on assuming the business I started down straight to the factory that was then furnishing William M. Dee, or my father, whose business I took.

Q. What factory was that?

A. Camp & Thompson.

Q. Where was that factory?

A. At Cuyahoga Falls.

Q. When did you reach Cuyahoga Falls on this trip?

A. I got there some time about the 20th, I believe, of January, in 1893. I saw Mr. Camp there. Mr. Thompson was in Cleveland, he stated. I told him the object of my——

Mr. WALKER: We object to anything that occurred between him and Camp & Thompson.

The COURT: Yes.

Mr. COGHLAN: Your honor please, Camp & Thompson was one of the constituent members of the Union Sewer Pipe Company. Camp & Thompson, called on behalf of the plaintiff in this case, have admitted this conversation. All of the officers of the Union Sewer Pipe Company have admitted this contract and said it was assumed by the Union Sewer Pipe Company.

The COURT: If you have it, don't let us have it again.

Mr. McFEE:

Q. Who was Mr. Camp?

A. Mr. Camp was a member of the firm of Camp & Thompson: H. B. Camp.

Q. You may state what conversation you had with Mr. Camp concerning this 308 car-loads.

Mr. WALKER: That is objected to.

497 The COURT: That is the objection that Mr. Walker makes—that is, that he cannot be bound by any conversation with Camp. There is no evidence here, that I remember, to show that Camp could bind this plaintiff by anything he says.

Mr. McFEE: Your honor, this was a contract between the constituent members. I thought your honor had ruled that you would allow the evidence of this contract to go in. We have first got to

show the contract of Camp & Thompson and then its assumption by the plaintiff.

The COURT: I do not see how you can make conversations with Camp competent, as I understand this testimony.

Mr. McFEE: There was a verbal contract, your honor, and we have got to show that, of course, by the testimony and agreement of the parties.

The COURT: Camp & Thompson, was that the firm?

Mr. McFEE: Camp & Thompson, that firm.

The COURT: Their firm were members of the Union Sewer Pipe Company?

Mr. McFEE: Yes, sir; and they turned over the contract.

The COURT: They were the stockholders, were they not?

Mr. McFEE: Not stockholders. They were parties to this agreement. The stockholders were not parties to the agreement.

Mr. COGHLAN: Camp was one of the contractors, wasn't he, of the Union Sewer Pipe Company?

Mr. WALKER: Camp & Thompson made a contract with the plaintiff?

Mr. McFEE: Yes, sir; and turned over this contract for 308 carloads.

498 Mr. COGHLAN: Which they assumed?

The COURT: I don't see how you are going to hold the plaintiff in this case by the statements of Camp, as a legal proposition.

Mr. McFEE: Of course, your honor has ruled out that we cannot hold them for liability under this contract, but we can show its breach, and to show the results of this breach after their assuming it is competent testimony to show the extent of this combination or that the combination was an unlawful combination, and it is for that purpose that we offer it.

The COURT: The only way that you can show this plaintiff corporation assumed that contract would be to make that corporation in some way a party.

Mr. COGHLAN: That is already in evidence, your honor, that they did.

Mr. McFEE: Mr. Camp testified that they turned it over, and they testified that they assumed it, but they pushed up the prices.

Mr. HAMLIN: Mr. Camp denies the contract entirely.

Mr. McFEE: He says he does not think the effect was to bind them absolutely, but we deny that.

Mr. WALKER: They have a contract, if your honor please, with the Union Company.

Mr. McFEE: The contract with the Union Company we have made subsequently to this.

Mr. WALKER: Whatever rights Dee has got are fixed and determined by this contract which he has got.

Mr. McFEE: Not at all; not embraced in that contract at all. That contract was not made until two years afterwards.

(Counsel — contract or document.) I will offer that in evidence.

499 I now offer in evidence a pleading in this case which has been withdrawn—a declaration filed February 26th, 1897, and withdrawn under the order of court.

I offer that part of the declaration which sets up in full the contract sued upon, and offer it as Defendant's Exhibit 1.

(Whereupon said pleading was for the purpose of identification marked "Def't's Ex. 1.")

Mr. WALKER: Do you offer that declaration in evidence?

Mr. McFEE: I don't see why not. Pleadings are competent evidence of the admissions of the parties, whether they are withdrawn or not.

The COURT: Whose declaration is it?

Mr. McFEE: The declaration of the plaintiff.

Mr. WALKER: I object to that.

Mr. McFEE: You see the inconsistency of the learned counsel. He asks why we do not offer it, and when we offer it he doesn't want it in.

Mr. WALKER: I object to that contract going in at all, but let them offer it in a legitimate way. I do not know whether that is a copy or not.

Mr. McFEE: Your honor, I wish to say this, that a great many papers have be n lost in this matter. This case was not my case. It was Prendergast's case, and when Prendergast died I did not succeed to all of his business, and cases in which I had not been specially retained I have bundled up all the papers and sent them down to his executors, and this case, with its many perplexities, was one of them that I was glad to get rid of. And I have sent all the papers down there. I have had three men ransack the vaults in Mr. Hummer's office for the papers, and we could not find
500 these papers and some exhibits could not be found.

We found copies of our depositions, but a great many papers have got mixed up so that with 24 hours' labor of two men we could not find them. So that is what this contract is (indicating).

The COURT: Is that a short contract?

Mr. McFEE: Oh, it is one page, two pages, three pages.

Mr. HAMLIN (finding paper): If your honor please, I have got that contract.

Mr. McFEE: Then let us have it, if you don't object.

The COURT: Then get the original and let it go in.

Mr. McFEE (reads contract as follows):

Which contracts was in the words and figures following, to wit:

501 Memorandum of agreement, made and entered into this 20th day of August A. D. 1895, between the Union Sewer Pipe Company of the city of Akron, county of Summit, and State of Ohio, party of the first part, and William E. Dee, of the city of Chicago, county of Cook, and State of Illinois, party of the second part, witnesseth:

The party of the first part agrees to sell and deliver to the party

of the second part, sewer pipe free on board cars at its factories, at the following discounts off the western price-list, to wit:

| | |
|---|---|
| First-class socket pipe from 2″ to 20″ inclusive | 85 % |
| 24″ socket pipe | 80 " |
| 6″ and 9″ ring pipe with rings | 85 % |
| 10″ and larger ring pipe with rings | 75 % |
| All sizes second-class socket pipe | 90 % |
| All sizes second-class ring pipe and rings | 87½ % |
| All sizes second-class ring pipe without rings | 90 % |
| Ring cull pipe, with rings | 85 % |
| Ring cull pipe without rings | 87½ % |

All shipments by said first party in any one month to be settled for by note or acceptance of the second party payable at bank in Chicago, in ninety (90) days from the tenth (10th) of the month following the month in which shipments are made, or if preferred, by said second party, settlements may be made in cash by the tenth (10th) of the month, following the month in which the shipment is made, and for such cash settlement an additional discount of two (2%) per cent. on the net amount may be deducted from the bill: but, in no cases will the said first party accept city or town warrants in settlement of said shipment.

502 In consideration of the foregoing agreement, the party of the second part agrees to purchase and handle exclusively the sewer pipe handled and sold by the first party, except when the first party is unable to furnish the party all orders for sewer pipe that they, the second party may make.

In consideration of receiving the entire trade for sewer pipe, from the party of the second part, it is agreed by the party of the first part that a rebate of one (1%) per cent. of the gross sales be allowed said second party. Said rebate to be paid second party at the close of each year, provided the terms of this agreement have been faithfully carried out;

It is further agreed between the said first and second parties, that said first party will supply said second party seventy-five car-loads of socket pipe of sizes two to twenty inch inclusive, at 87½% discount f. o. b. works. The above rebate of one per cent. (1%) not to apply on the pipe sold at 87½ % discount.

The said second party further agrees to sell on and after Sept. 1, '95, all sewer pipe purchased from the party of the first part free on board cars in car-load lots, or at their respective yards or places of business in the city of Chicago or Cook county, at the following discounts from the western price-list, viz:

| | |
|---|---|
| 6″ and 9″ ring pipe with rings and socket pipe up to and inclusive 20″ on yard | 70 % off list. |
| 24″ socket pipe on yard | 60 % " |

By car-loads f. o. b. cars in Chicago—

| | |
|---|---|
| 6″ and 9″ ring pipe and rings and socket pipe up to and including 20″ | 75 % " |
| 24″ socket pipe | 67½ % " |

503 But in no case shall second- or culls be shipped by first party for use within the corporate limits of the city of Chicago.

Upon receipt of satisfactory evidence of violation of the terms of this agreement, by said second party, it is agreed between the first and second parties that it remains optional with the first party to cancel this contract with the second party and the first party will refuse to sell pipe to party of the second part.

This contract may be terminated by either party giving the other thirty days' written notice of such desire.

In witness whereof we have hereunto affixed our hands and seals on the day and date first above written.

THE UNION SEWER PIPE CO.
(Signed) B. W. ROBINSON, *Sec'y.*
WILLIAM E. DEE.

504 (Said contract for the purpose of identification was marked "Def't's Exhibit 2.")

Mr. McFEE:

Q. Mr. Dee, what kind of a contract did you have prior to this written contract, which I have just read in evidence, with the Union Sewer Pipe Company?

A. The Union Sewer Pipe Company? Well, I had that contract for the 308 cars.

Q. What was that?

A. It was 308 cars of city pipe.

Q. At what price?

A. Now, understand me. Don't understand me—I had it first with Camp & Thompson.

Q. At what price?

A. At 80 off the list.

Q. In that agreement was it designated for what contracts those 308 cars were to be needed?

A. For what contracts?

Q. Yes, sir.

A. For city contracts.

Q. Well, I mean for what contractors.

A. Well, I have got the list here somewheres (pointing to table).

Q. That is what you said you had?

A. No; it was not given to me.

Mr. COGHLAN: Here it is. (Hands witness paper.)

Mr. WALKER:

Q. Was that agreement in writing?

A. No, sir; verbally.

Mr. WALKER: I am objecting to your stating what occurred between you and Mr. Camp. I don't object to your stating what the Union Company agreed to do.

Mr. McFEE: They agreed to do what Mr. Camp agreed to do. So there we are.

Mr. WALKER: They were told what they were to do.

Mr. McFEE:

505 Q. What was your agreement, if any, between the Union Sewer Pipe Company and yourself, the agreement in reference to these 308 cars?

A. In reference to these 308 cars?

Q. Yes.

Q. I have no agreement with them. I understood that when Mr. Camp went into——

Mr. WALKER: Not what you understood.

The WITNESS: I had no talk with anybody but Camp on this, except afterwards.

Q. It is afterwards that we wish to get at.

A. Well, Mr. Hill came on down—the president of the Union Sewer Pipe Company. I claimed the delivery of those cars.

Q. Was there any talk at that interview about their assuming the contract of Camp & Thompson?

A. They denied the assumption of it. Mr. Hill denied the assumption of this contract.

Q. Was that the contract that Mr. Buell testified about in their testimony?

A. Yes, sir.

Q. Was there in that contract any reference to the contractors for whom this pipe was to be delivered?

Mr. WALKER: In what contract?

Mr. McFEE: The contract that Mr. Buell testified was assumed—the testimony that you offered on behalf of Mr. Buell: I will turn to it.

Mr. WALKER: This witness says he never had a contract.

Mr. McFEE: No; he don't at all; he says Hill denied it.

Mr. COGHLAN: If your honor please, the way I understand the testimony so far shows there was a contract existing between Camp & Thompson and Mr. Dee at this time. The testimony shows that by Mr. Buell and by a great many other witnesses; that the board of director- assumed that contract. Now, we want to show by Mr. Dee that they assumed the contract, and that the same is re-

506 ferred to in the evidence of these witnesses. I think for that reason these questions are competent.

Mr. HAMLIN: I will correct the statement of counsel that this contract was not made——

The COURT: Mr. Dee swears that he had no talk with anybody, except Camp, at all. He saw Mr. Hill later in Chicago, when Mr. Hill denied having assumed the contract.

Mr. COGHLAN: That does not prove, if your honor please, where other testimony of other witnesses shows that it was assumed.

The WITNESS: Others had——

The COURT: We are only dealing with this witness.

The WITNESS: Others have told me that they assumed it.

The COURT: That don't make any difference.

Mr. McFee:

Q. Did you have a contract with Camp & Thompson concerning those 308 cars at any time before the formation of the Union Sewer Pipe Company?

A. Yes, sir.

Q. Were there any shipments made under that contract before the Union Sewer Pipe Company was formed?

A. Yes; there was about three or four cars—five cars on that contract.

Q. Were any shipments made under that contract after the Union Sewer Pipe Company was formed?

A. Not at the prices agreed upon by Camp & Thompson.

Q. Were any shipments made?

A. Yes; but the price was changed.

Q. Who sent the invoices for those shipments after the formation of the Union Sewer Pipe Company?

A. The Union Sewer Pipe Company; Camp & Thompson prior to that.

Q. Who sent the invoices for those shipments prior to
507–516 the formation of the Union Sewer Pipe Company?

A. Camp & Thompson.

Q. What prices were charged by Camp & Thompson for the shipments made prior to the formation of the Union Sewer Pipe Company?

A. 80% off list.

Q. What prices were charged by the Union Sewer Pipe Company?

A. 75% off list.

Q. So that the Union Sewer Pipe Company delivered on that contract how many cars?

A. The full amount.

Q. How did you pay for the car-loads that were shipped to you under this contract?

A. What was the method of paying for them?

Q. Yes.

A. Paying for them by note.

Q. How did you pay and when did you pay?

A. By note—90-day note was the custom in the business.

Q. Did you have any conversation or any correspondence at any time that you sent your notes or paid your notes?

A. Yes, sir. I refused to pay 75% off on account of the contract made with Camp & Thompson.

Q. What was said concerning that?

A. I wrote——

* * * * * * *

517 Mr. Dee resumes the stand for further examination by Mr. McFee:

Q. Did you bring any letter-press books with the other papers to Mr. Prendergast's office?

A. Yes, sir: I brought everything that pertained to the case.

Q. Now, you may state the language of the letter addressed by you to the Union Sewer Pipe Company, as nearly as you can, concerning the payment of the first invoice.

Objected to.

The COURT: I think he has got to lay more foundation for that—the date, and what it was in reply to—if he has got anything to show.

Mr. McFEE: We have shown that it is lost.

The COURT: Give the date.

Mr. McFEE: We except, of course, to your honor's ruling. We won't go into it.

Q. Did you ever personally have any conversation concerning this charge of 75% instead of 80% off with any of the officers of the Union Sewer Pipe Company?

A. Yes, sir.

Q. With whom?

A. All of them, pretty near.

Q. State who they were and when the various conversations occurred.

A. I had it with Mr. Hill, I had it with Mr. Camp, I had it with Mr. Buel, I had it with Mr. Gibbs, and I had it with Mr. Baldwin.

Q. Now, beginning with Mr. Hill, when did you talk with him about it?

A. I think it was some time about the first of April.

518 Q. What year?

A. 1893.

Q. Is that soon after the first shipments under this contract?

A. The shipments, I believe, began about the first of March.

Q. This was in April, 1893?

A. Yes, sir; Mr. Hill was up here in Chicago.

Q. Where did you see him?

A. In the Tremont house.

Q. What did you say then?

A. I told him of this contract.

Q. State the language that you used.

A. I told him that I had contracted with Camp & Company or Camp & Thompson for the delivery of these 308 cars on this contract, and that I had written the Union about it, and he promised me to see Camp when he went back about it.

Q. Did you say anything about the extra charge of 5% on the list price?

A. Did he say anything about it?

Q. Did you say anything about it?

A. Why, yes; I complained about it. I told him I understood the Union assumed the contract.

Q. Now, let me ask you, Mr. Dee, just for the information of the jury, about the discount; the difference in discount price from 80 to 75% would make how much on each car-load?

A. Well, a ring-pipe car generally averaged about $550.00; it would make $27.00 or $27.50, 5% of $550.00.

Q. On each car-load?

A. Make about $27.50 per car; that was an average-run ring-pipe car, $550.00, $27.50.

Q. Did you refuse to make the payment at 75?

A. Oh, yes; yes, sir.

Mr. WALKER: Wait a minute, if the court please; I want to enter a protest against this method of examination of this particular witness.

519 The COURT: I think you ought to ask what was said.

Mr. McFEE:

Q. What was said—can't you state just what was said, Mr. Dee—the whole thing?

A. To Mr. Hill?

Q. Yes.

A. I told Mr. Hill that those cars should—those ring-pipe cars should be billed to me at 80% off instead of 75% off; that I had made a contract with Camp & Thompson to deliver me 308 cars of city pipe for my city contracts, which I was under contract to deliver, and that I understood that the Union assumed the contract and were to deliver it. He told me he would see Mr. Camp about it when he went back.

Q. What did you say about the charge of 75% off?

A. Why, I told him it was not right, it should be 80%.

Q. When did you make payment of the first installment of the contract price, the amount paid on the 308 cars?

A. I think it was about the latter part of March or the latter part of April; I forget now which it was that we made payment.

Q. Was that prior or subsequent to this interview with Hill?

The COURT: I don't know where you are getting to on this testimony.

Mr. McFEE: I want to show your honor that at the time we made this payment we were protesting that we were——

The COURT: There isn't any use of going into details all the time: he has stated what he said.

The WITNESS: I sent the invoice back first—when it came with 75% off I sent it back and—back to the Union.

Q. Why did you make any payment then?

A. Because I had to.

(Objected to.)

520 Mr. WALKER: I can't see what bearing this evidence will have.

The COURT: I don't think it has, either.

Mr. McFEE: It shows, your honor, the necessity for paying that price.

The COURT: That is ruled out.

To which ruling of the court the defendants, by their counsel, then and there duly excepted.

Q. Who was the next one you had a conversation with concerning the extra charge?
A. Mr. Camp.
Q. When was that?

Mr. WALKER: That is already ruled out.
The COURT: Any evidence he gave wouldn't bind this company.
To which ruling of the court the defendants, by their counsel, then and there duly excepted.

Q. Who was the next one?
A. My belief is, Mr. Buel.
Q. When did you have a conversation with him?
A. Why, just about the same time they were coming up here; a number making trips up here.
Q. Who was Buell?
A. He was secretary of the National Sewer Pipe Company and one of the members of the Union Sewer Pipe Company.
Q. Now state the conversation with him.

Mr. WALKER: To that I object.
(Objection sustained.)
To which ruling of the court the defendants, by their counsel, then and there duly excepted.

Q. Who was the next?
A. I believe Mr. Thompson was the next.
Q. What relation did he have with the plaintiff, The Union Sewer Pipe Company?
521 A. One of the members of the firm of Camp & Thompson and one of the members of the Union Sewer Pipe Company.
Q. When did you have the conversation with him?
A. All the same date. They were up here on and off—up and down here.
Q. State the conversation.

(Objected to.) Objection sustained; to which ruling of the court the defendants, by their counsel, then and there duly excepted.

Q. Who else?
A. I think Mr. Gibbs was the next one.
Q. Where did you have a conversation with him and when?
A. I couldn't give the exact date. I think it was some time in April.
Q. State that conversation.

Objected to. Objection sustained; to which ruling of the court the defendants, by their counsel, then and there duly excepted.

Q. Now, who were the others?
A. I think the next trip was in Akron. I think I was in the office—in the Union Sewer Pipe Company's office—in reference to the matter. I think I met Mr. Baldwin—I think I met the whole push there.

Q. Did they ever cease making shipments to you of any installment of those 308 cars?

A. Yes, sir.

Mr. WALKER: I submit, if your honor please, that it would seem that we have gone into that contract sufficiently to show the nature of it.

Mr. McFEE: I think it is competent to show now that they stopped shipping and refused to ship further unless we paid the increased price.

Mr. WALKER: If it is competent for you to show that, then it is competent for us to bring in our witnesses.

522 The COURT: We might get in all the business in Chicago before you got through if you commenced. Do you make an objection?

Mr. WALKER: I do object.

The COURT: Objection sustained.

To which ruling of the court the defendants, by their counsel, then and there duly excepted.

Q. Did you ever have a conversation with Mr. Hill concerning the effect of this Union Sewer Pipe Company upon your business in Chicago and the business of Mr. Connelly and the other dealers in pipe here?

A. In reference to what?

Q. The effect of the combine or effect of the organization of the Union Sewer Pipe Company upon your business.

Mr. WALKER: Conversation with who?

Mr. McFEE: With Mr. Hill, that Mr. Hill has testified to.

A. With reference to the 308 cars; yes, sir.

Q. No, no; as to the effect upon your business of the organization?

A. We had a general talk. I forget now what the substance was.

Q. Did you state that it was beneficial to you?

A. No, sir; never stated that.

Q. Or that it was beneficial to the other dealers?

Mr. WALKER: If you bring this in as impeaching questions or impeaching evidence, then read your question.

Q. Did you have a conversation with Mr. Baldwin in which you expressed yourself as feeling that it was to your interest and to the interest of Mr. Connelly, and that the interests of both of you were best promoted by the combine known as the Union Sewer Pipe Company?

523 A. Never with Mr. Baldwin; no, sir; never had any such conversation with Mr. Baldwin.

Mr. MANSER: With Mr. Hill?

A. I don't remember of ever with Mr. Hill. I don't remember of any such conversation; never with Mr. Baldwin; I am positive with

Mr. Baldwin. I don't recollect any with Mr. Hill; I am positive with Mr. Baldwin. My best recollection——

The COURT: Don't say any more; that is sufficient. You will fill up this whole record.

Q. Did you ever state to Harry Thompson that you could make more money after the Union was formed than you could before?
A. Not to my memory; I can't recollect it now.

Cross-examination by Mr. WALKER:

Mr. WALKER: The examination, your honor, will be very short, but I would very much prefer to make it in the morning if I can.

Whereupon an adjournment was taken to Friday, January 26th, A. D. 1900, at 10:00 o'clock a. m.

524 JANUARY 26TH, 1900—10 a. m.

Court met pursuant to adjournment.

WILLIAM E. DEE, resuming the stand, testified as follows:

Mr. McFEE:

Q. Mr. Dee, where did you sign the contract between you and the Union Sewer Pipe Company which has been introduced and read in evidence?
A. At the Tremont house, Chicago.
Q. Where did the Union Sewer Pipe Company sign it?
A. At the Tremont house.

Cross-examination.

Mr. WALKER:

Q. Mr. Dee, before your father's death were you associated with him in business?
A. Yes, sir.
Q. For how many years were you with him as a partner?
A. I was with him up to, I think it was, three years or two years before he died. Then I went in the contracting business.
Q. What was the name of the firm?
A. William M. Dee & Son.
Q. You were very large dealers in sewer pipe, were you not, in the city of Chicago?
A. Yes, sir.
Q. In buying and selling?
A. Yes, sir.
Q. Selling to contractors here in the city, supplying them with pipe?
A. Yes, sir.
Q. For sewers?
A. Yes, sir.
Q. And selling outside of the city?
A. Yes, sir.

Q. Then you went into the contracting business?
A. Yes.
Q. And after your father's death you resumed the charge of the old business of the firm?
A. Yes, sir.
Q. And since that time you have been conducting that business?
A. Yes, sir.
525 Q. And have been doing a large business?
A. Yes, sir.
Q. Your firm has at all times been perhaps the largest firm in that business in the city?
A. Yes, sir.
Q. Were all the other firms engaged in the same business, buying and selling pipe, supplying contractors?
A. Yes, sir.
Q. And supplying them?
A. Yes, sir.
Q. About how many, without naming them?
A. About 5 or 6, I think.
Q. 5 or 6?
A. Yes, sir.
Q. During the years preceding the death of your father and while you were a partner——
A. Well, I was a partner.
Q. While you were a partner under the firm name of Wm. Dee & Son, how many kinds of pipe, brands of pipe or makes of pipe, did you use in trade? I am not talking about the laying of the pipe in the streets now.
A. I think we handled—I think we handled two brands. We handled—no, we handled one brand—one brand I believe it was. You see it is about ten years ago. My recollection—maybe we handled another one, but I think there was only one.
Q. What was that?
A. Sperry.
Q. You handled the Sperry make?
A. Yes, sir.
Q. And what you call the Akron make?
A. Yes, sir; from one of the Akron concerns.
Q. Did you buy of one particular manufacturing establishment in Akron?
A. Yes, sir; I think there was only one then; yes, sir.
Q. Now, from 1893 down to 1896 you were still, you say, engaged in the same business. What brands of pipe did you handle during those years?
526 A. Camp & Thompson and National Sewer Pipe. A few cars we had, I think, from the Akron Sewer Pipe Company. Probably some from the Crown.
Q. Did you handle any of the Columbus pipe?
A. Yes, sir; I had a few cars from them.
Q. Did you handle any of the Brazil pipe that was manufactured there in Brazil, Indiana?

A. Yes, sir; between what time?
Q. During those three years that I have named.
A. No, sir; not to my recollection.
Q. At any other time did you handle it?
A. Hold on, now, one minute. I don't want to go too fast. I did handle a few cars from Brazil until they were knocked out by the city. The city would not accept them.
Q. I did not ask you anything about knocking out by the city. I want you to answer the question that I asked.
A. Yes, sir.
Q. Did you deal in that pipe during those three years?
A. I handled a few cars, as I stated.
Q. Red Wing, Minnesota—was there a factory there?
A. Yes.
Q. Did you handle any of that pipe?
A. No city pipe from there then—small pipe.
Q. Monmouth, Illinois—was there a factory there?
A. Yes.
Q. Did you ever handle any of that pipe in the city of Chicago?
A. No, sir; they would not allow it to come in.
Q. I asked you if you handled it.
A. No, sir; not in the city of Chicago. I did not. Outside of the city of Chicago I did.
Q. Did you buy and sell it is the question?
A. No, sir; not in the city of Chicago.
Q. I did not ask you that.
A. I used it outside at La Grange; yes, sir; or at West Grossdale.
Q. For their sewers?
527 A. Yes, sir; for sewers in West Grossdale.
Q. Were you a contractor out there?
A. Yes, sir.
Q. And you used it there?
A. Yes, sir; at West Grossdale; yes, sir.
Q. Was there a factory at Streator, Illinois?
A. Yes, sir.
Q. Did you ever use any of that pipe—buy or sell it?
A. No, sir; I did not buy or sell it.
Q. Utica, Illinois—did you ever buy or sell any of that pipe?
A. No, sir; I could not.
Q. St. Louis, Missouri—did you ever buy or sell that pipe?
A. No, sir; I could not.
Q. Will you answer my question and stop, or I will have to call the court in to correct you?
A. All right, sir; I supposed you want me to give you all the particulars.
Q. Do you know of a factory at White Hall, Illinois?
A. Yes.
Q. Did you deal in that pipe?
A. No, sir.
Q. Was there one at Jackson, Michigan?
A. Yes, sir.

Q. Did you ever deal in that pipe?
A. No, sir.
Q. Grand Ledge, Michigan—was there a factory there?
A. Yes.
Q. Did you ever deal in that?
A. No, sir.
Q. Now, will you tell the jury about how many manufacturers of sewer pipe there were in the country, East and West; can you do that?
A. I think I can. Oh, I suppose there were in the neighborhood of about sixty, I guess; 50 or 60; I never counted them.
Q. Weren't there over a hundred in the country?
A. I don't believe so.
Q. You don't know, then, if I understand you?
A. Oh, no, sir. I never counted them up; I positively say that I never counted them up; a rough guess; that is all.
528 Q. I understand you to say that in the main sewers constructed in Chicago under specifications, by contractors under specifications, those specifications required strictly Akron standard pipe. Am I right?
A. At a certain time it did.
Q. What times?
A. I think it was previous to 1890.
Q. Previous to 1890?
A. Yes, sir.
Q. Was there any such requirement in 1893?
A. I am pretty sure there was, "Akron or its equal."
Q. How?
A. "Akron or its equal."
Q. That was in the specifications?
A. Yes, sir.
Q. Those specifications were uniform, were they not? Printed on blanks?
A. Yes, sir.
Q. Had there been any change in the specifications prior to 1893?
A. Prior to 1893?
Q. Yes. Relative to the character of the pipe that would be received?
A. No; not to my knowledge. I never looked at the s-ecifications.
Q. Prior to 1893 and after 1893, until what time did the specifications require standard Akron pipe?
A. Unless a recent date they have changed the specifications. I have not looked at them very recently because it was a common thing known.
Q. Never mind your argument.
A. Yes, sir; I think the Akron pipe or its equal is in there still, but I may be mistaken. It has been in there up until recently, I think; I have not looked at it very recently.
Q. You think, but do you know?

A. I have not looked at the specifications recently, so I could not say.

529 Q. Well, do you know whether prior to 1893 the specifications required standard Akron pipe?

A. I am pretty sure it did. It required Akron pipe or its equal prior to 1890. I don't want my answer misunderstood; that is all I am after.

Q. I don't want you to be misunderstood. Prior to 1890, then, in your opinion, the specifications required standard Akron pipe?

A. Called for Akron pipe.

Q. Now, after 1890, what is your statement?

A. Akron pipe or its equal.

Q. Those words were used?

A. I am pretty sure.

Q. How many of those specifications have you examined? How recently?

A. As I tell you, I have not examined them very recently.

Q. Have you had a contract with the city since 1890?

A. Oh, yes, sir; a number of contracts.

Q. Did you examine the specifications?

A. Not the material specifications; the general specifications that has reference to the work I did.

Q. "General reference to the work" that you did?

A. Yes.

Q. I understand you to say that the city inspectors would not pass anything but standard Akron pipe for the main sewers?

A. They have never done it for me, except when I would sneak it on them.

Q. Could you say whether or not that was the rule?

A. Akron standard; that was the rule.

Q. How was the department organized? How was it in 1893, and how is it now?

Q. Why, it is the department of public works.

Q. Well, there is chief inspector?

A. A chief inspector; yes, sir.

Q. Of sewers?

A. Yes, sir.

530 Q. Do you know his name or the name of the chief inspectors during these three years?

A. I think "McNichols" is one, and the gentleman who was on the stand here.

Q. What was his name—I forget?

A. McNichols; the gentleman that was on the stand here?

Q. Yes.

A. And I think there was a man in there at that time—they changed the other inspectors more than they did McNichols—I think the other was O'Neill—and Stanley. I don't know as there was any other there in that time.

Q. Did you ever know—there is a superintendent of sewers, is there not?

A. Yes, sir; there is superintendent of the sewer department.

Q. A superintendent?

A. Of the sewers department.

Q. He holds an office higher than the inspectors?

A. Yes, sir. Oh, yes, sir; he is the superintendent of the whole thing.

Q. And the inspectors, if they take directions, take them from the superintendent?

A. Yes, sir; as a rule.

Q. Did you ever know a man by the name of Cook?

A. Yes, sir.

Q. Superintendent of sewers?

A. Yes, sir. I knew him well.

Q. Do you remember when he was superintendent?

A. Well, I could not say exactly. There has been so many changes in there. I think he was superintendent in 1894 and 1895, I think, or some time in there. I would not say exactly.

Q. Did you know a man by the name of Clausen?

A. Yes, sir.

Q. George L.—G. L. Clausen?

A. Yes, sir.

Q. Superintendent of the bureau of sewers?

A. Yes, sir. He was in there after Cook.

Q. And he ought to rank the inspectors?

A. Yes, sir.

531 Q. D. E. Davidson?

A. Yes, sir; he followed *by* Clausen.

Q. Followed Clausen?

A. Yes, sir.

Q. C. H. Cheedy?

A. Cheedy was before Cook; Cheedy or Lowe, I don't know which.

Q. You have said that no other pipe but the Akron pipe would be received?

A. That was the standard; yes, sir.

Q. No other pipe was satisfactory to the department—to the officers in charge of the department?

A. We had a great deal of trouble getting any other in.

Q. Will you look at those letters (indicating)? Do you see if they refresh your recollection? (Hands papers to witness.)

Mr. McFEE: May I see them? (Looks at letters so handed witness.)

Mr. WALKER:

Q. You recognize those letters as coming from them?

A. I have not looked at them all yet (witness examining letters). Yes, sir.

Mr. WALKER: I offer these letters in evidence as a part of the cross-examination of this witness.

The WITNESS: Did I understand you to ask me the question in reference to those letters?

Mr. WALKER: I asked you if you recognized them as letters coming from the superintendents or officers of that department?

The WITNESS: I don't know who they came from. The letters show for themselves what they are. I don't know any more than that—than what is on the letters. I could not verify the signatures.

532 Q. Oh, it is not necessary for you to do that.

Mr. COGHLAN: If he proves the signatures of those letters and shows they are *bona fide* from the city of Chicago we have no objection.

Mr. WALKER: You certainly do not want me to prove——

Mr. COGHLAN: I want you to prove whether they are spurious letters or not.

Mr. WALKER: I would rather hear from Mr. McFee after a statement of that kind. When counsel would infer that I would produce spurious letters from a city department I cannot reply to it.

Mr. COGHLAN: I mean that I want you to prove they *they* are not spurious. Certainly I do. I do not mean to insinuate that you are doing anything of that kind.

Mr. McFEE: We do not charge Mr. Walker with introducing with his knowledge any spurious letters.

Mr. COGHLAN: There is one letter that I know of my own knowledge does not come from the man that signed it.

Mr. McFEE: There is one thing that I wish to say. They pretend to show, your honor, something about the Columbus sewer pipe, but they do not pretend to suggest that the pipe was put in the main sewers. Now, it is not claimed by this combination that there was a vast amount of pipe used by the city in other than main sewers, but in main sewers standard Akron pipe was during those years alone used, and unless they refer to these sewers it is not in controversy.

Mr. WALKER: I only offer those letters as a part of the cross-examination. Of course, Mr. Dee has not taken the trouble to say that he is familiar with the signatures—letters that have on
533 them the heading of the department of public works and are written upon the official paper of that department. Of course, the counsel can require us to send over and bring the parties here to identify their signatures, which we will do if the objection is insisted on.

The COURT: Are they letters to Mr. Dee?

Mr. COGHLAN: No, sir.

Mr. WALKER: They are introduced for the purpose of contradicting this witness, and that no other pipe but the Akron standard pipe would be received by the department of public works in the sewers.

The COURT: Well, if they are not letters to Mr. Dee, and they do not admit the genuineness of them, I do not think they are admissible.

Exception by plaintiff overruled.

Mr. McFEE: No, your honor; and they do not refer to the pipe in controversy.

The COURT: And you may reserve that in your argument.

Mr. WALKER: I am afraid you did not read them all, Mr. McFee. We will show that those letters came from the parties whose signatures are attached to them; that that pipe was Columbus pipe, and that it did go into the main sewers, and that it was accepted by the department.

Mr. McFEE: That is the best way to prove it. Those letters are directed to "all whom it may concern:" sort of general statement.

Mr. WALKER:

Q. Now, Mr. Dee, look at that blank form of specifications (indicating)—one that is enclosed in brackets marked "pipe."

Mr. McFEE: Before you answer I would like to see that, Mr. Dee.

Mr. WALKER: I only asked him to look at it.

534 Mr. McFEE: Yes. It is a form of the specifications used.

Mr. WALKER: Yes.

Q. Do you recognize that (indicating) as a blank form used by the city department or the sewer department?

A. Apparently it is the latest form used.

Q. Apparently the latest form used?

A. Yes, sir.

—. Well, it is apparently anything but a form of specifications that are embodied in the contracts for the constructions of sewers in the city of Chicago.

A. Yes, sir.

Q. What is it, then?

A. Yes, sir; I said it was; yes, sir.

Mr. WALKER: We offer that in evidence—that part only.

Mr. McFEE: Now, that I would like to see now. (Takes paper from witness.) Well, I would have to object to this, Mr. Walker, and ask proof that that is the specification for this reason. I will state the reason——

Mr. WALKER: I have proved that that is the specification.

Mr. McFEE: He says it is apparently a late form. He does not identify it; but down there they had a Mr. Davidson, a superintendent of sewers, who adopted his own forms, and Davidson was put out there—he was in there just a little while—and this is one of the Davidson forms.

Mr. WALKER: Now, Mr. McFee, if you are insisting on that we will offer that with evidence that that has been the form for years long prior to 1893, and during these various years that the witness has testified about, and that we will prove by the department or officers of the department. Davidson was not put out. At least he was not put out for introducing any changes in the specifications.

(To Mr. McFee:) Have you objections yet?

535 Mr. McFEE: Why, we object to the introduction of it, Mr. Walker.

The COURT: Well, I suppose until you show that this was the specification, copy of the specifications in use at the time that these transactions took place, you have not made it competent evidence.

Mr. WALKER:

Q. Will you look at that again, sir, and point out, if you can, what changes or how it differs from the specifications that were in force between 1893 and 1896?

A. I think in 1893 it mentioned Akron pipe in it, or its equal—Akron pipe or its equal. That is my recollection. Of course I don't—can I make a statement as to the reason?

Q. Answer.

A. Can I make a statement in reference to my reason?

Mr. McFEE: I submit he is entitled to do that, your honor.

The COURT: Isn't it the right of the witness to explain his answer?

Mr. WALKER: Not when he has answered directly. Is Mr. Nash in the *the* room? He was to come here this morning and bring his copy of the specifications.

Mr. COGHLAN: If your honor please, I would state for Mr. Walker's benefit that Mr. Kent, who was the minister of public works for the city of Chicago during those years, is here in court, and I should judge he would be one of the best posted men in the city to pass upon specifications. If you like to have him you can have him.

Mr. WALKER: I do not know whether we wish to borrow your witness or not.

Mr. COGHLAN: I thought you might wish to borrow our information.

536 Mr. WALKER: No, sir; we will send direct to the office.

Q. Mr. Dee, you were stating that you were dealing generally with pipe during the years 1893 to 1896, buying and selling in the city of Chicago?

A. Yes, sir.

Q. What proportion of your business was in the Akron pipe; what proportion of the entire business done by you during those years was in Akron pipe?

A. About 90 %, I think; 85 to 90 %.

Q. What was the value of your business per year, on an average, during those years in dollars and cents?

A. About one hundred and fifty thousand dollars, I think.

Q. About one hundred and fifty; and 90 % of that was in goods bought at Akron, Ohio, of the Union Sewer Pipe Company?

A. Do you mean to ask me if I bought $150,000 worth of pipe? Is that what you asked me?

Q. Yes.

A. No, sir: I don't think I bought that much pipe. I did not. The volume of my whole business I had reference to when I made the statement of $150,000. The amount of pipe I bought was about—oh, anywheres between 85 and 95 thousand dollars, probably.

Q. That covers the whole volume of your business in dealing in pipe?

A. Purchasing in pipe; yes, sir.

Q. And 90 % of that was bought of The Union Sewer Pipe Company, the plaintiff in this action?

A. Yes, sir.

Q. You referred to a conversation that you had with Mr. Hill, president of the Union Sewer Pipe Company, relative to your alleged contract with Camp & Thompson.

A. Yes, sir.

Q. And that he refused or said that their company could not recognize that contract?

A. I didn't say that.

537 Q. That they could not assume that contract; you say you did not say that?

A. I don't remember of making that statement; but Mr. Hill said that—I said that I told Mr. Hill that and Mr. Hill said he would see Mr. Camp about it.

Q. Yes; but you said prior to that time that Mr. Hill told you that they could not assume that contract. Do you remember that?

A. Possibly I did.

Q. But on another interview or else at the same interview he told you that he had seen Mr. Camp about it?

A. At a later interview, but at the first interview he told me that he would see Mr. Camp; but at a later interview possibly he did tell me that.

Q. Now, didn't he afterwards inform you that Camp denied the contract?

A. He did.

Q. And did he give that as a reason for their not assuming it?

A. Yes, sir; he gave that for one of the reasons.

Q. Mr. Dee, you have admitted that you purchased and received all this pipe covered by this suit. Did you also sell that pipe?

A. Yes, sir; I certainly must have by this time.

Q. How?

A. Yes, sir; I certainly must have by this time.

Q. A certain contract was read in evidence that was entered into between you and the Union Sewer Pipe Company—by you and the Union Sewer Pipe Company in 1895. You remember that contract?

A. 1895? I remember one in 1893. There were two, anyhow, that was made here in Chicago.

538 Q. I refer to the contract that was read in evidence yesterday——

A. Yes, sir.

Q. —which was made in 1895. What was the date of that contract?

Mr. HAMLIN: August the 20th, 1895.

Mr. WALKER: Mr. Dee, was that contract carried out by either party?

A. I don't know which contract you have reference to.

Q. I refer to the contract, which was read in evidence yesterday, of August, 1895.

A. I don't remember that.
Q. (Counsel shows witness said contract.)
A. Yes, sir; that is the contract (indicating).

Mr. WALKER:

Q. Now, I ask if that contract was carried out or performed or observed by either of the parties to the contract after its execution.
A. I think so.
Q. Didn't you buy and sell other pipe of other parties?
A. I have permission in there (indicating contract) to do so.
Q. And besides and above and beyond the provision?
A. No, sir; I don't think so.
Q. You don't think so?
A. I don't think so. I don't remember.
Q. Don't you remember that that charge was made—that you were doing it?
A. Oh, yes, sir; they kept charging me with everything.
Q. Of everything except with the payment of your debts.

Mr. McFEE: I object to that. I move that that be stricken out.
Mr. WALKER: Then strike out his answer. The witness will get nothing from me unless he gives a reason for it.

539 Redirect examination.

Mr. McFEE:

Q. Mr. Dee, you have been asked on cross-examination concerning a number of factories who manufacture pipe; can you state whether any of the product of the standard sewer pipe of those factories other than the Akron factories were accepted in Chicago or passed the inspection of the sewer inspectors up to 1895?
A. Nothing but Columbus. A little of Columbus used to come in.
Q. When did Columbus pipe first come to be accepted?
A. Well, it was accepted off and on and rejected time and again. It would be a hard question to answer that. It used to be accepted and knocked out, then accepted again and knocked out again; that is the way they used to run. Very little of it came in, anyhow.
Q. Was that so with Akron pipe?
A. No, sir; some of the Akron pipes used to get it, too, when they sent inferior pipe here—Robinson Brothers once in a while.
Q. Mr. Dee, you have been asked concerning a compliance with this contract. Do you remember the controversy with the agent of the Union Sewer Pipe Company here or their Chicago office that lead up to any breach of that contract?
A. Yes, sir; I claimed that they were doing business here in Chicago.
Q. Did they have business here?
A. Yes, sir.
Q. Who was their agent?
A. N. A. Williams.
Q. Did they have a stock in trade here?
A. Yes, sir; on all his yards.

Q. Who owned that stock?
A. The Union Sewer Pipe Company.
Q. Can you state, Mr. Dee, whether the specifications or the ordinance called in specific words for Akron standard sewer pipe
540 which it used, both, and what?
A. Well, I have given you my opinion.
Q. Can you state the reason that Akron standard——

Mr. WALKER: I submit that you examine the witness on the very proposition and I cross-examined him.

Q. I want to ask just one question. You say Mr. Williams was the agent of the Union Sewer Pipe Company?
A. Yes, sir.
Q. After this contract of 1895 was made?
A. I would not say after 1895; no, sir. That was not the way the question was put to me—previous to 1895—and I did not understand it that way.

541 WILLIAM D. KENT, called as a witness on behalf of the defendant, having been first duly sworn, was examined in chief by Mr. Coghlan, and testified as follows:

Mr. COGHLAN: Please state your name.
A. William D. Kent.
Q. What is your business?
A. Architectural iron and foundry business.
Q. Where do you reside?
A. 450 West Congress street, in the city of Chicago.
Q. I will ask you what, if any, public positions you held in the city of Chicago.
A. Oh, I have been a member of the library board, I have served in the council, and I have been a commissioner of public works.
Q. How long did you serve in the council?
A. Six years.
Q. What years?
A. From 1889 to 1895.
Q. And during that time what, if any, committees of the council were you on?
A. I was on the finance committee.

Mr. WALKER (to Mr. Coghlan): What are you doing?
Mr. COGHLAN: I know what I am doing. Don't you ask me what I am doing.

Q. What position did you hold after that?
A. I was commissioner of public works.
Q. What year did you go in as commissioner of public works?
A. The year 1895.
Q. How long did you remain in office?
A. Until the 20th day of, I think, July or August—I have forgotten which—1896.
Q. I will ask you how the office of commissioner of public works ranked with the office of superintendent of sewers.

542 A. The commissioner of public works in there is his superior. The department of sewers is a sub-branch of the department of public works.

Q. During the year that you were in office who was the superintendent of public sewers?

A. Mr. Clausen.

Q. Who was there previous to that time?

A. I don't recollect who held it just then.

Q. Mr. Cheney, wasn't it?

A. No, sir. Cheney went out prior to that time. I forget just when it was now.

Q. Are you acquainted or do you know anything about the product known as standard Akron pipe?

A. What do you mean?

Q. Do you know anything about what standard Akron pipe is?

A. Yes, sir; I do.

Q. How was it used in connection with the city of Chicago?

A. It was used in their sewer-work—building of new sewers.

Q. How did it come to be used in the sewers of the city of Chicago?

A. Well, the reason for making the specifications the same as they had—the specifications were issued, showing that nothing but the Akron pipe was to be used.

Q. Was that so at the time that you came into the position of commissioner of public works?

A. Practically so; yes, sir.

Q. What, if anything, did you do at that time towards remedying that condition?

A. Well, from what experience I gained in there as a member of the council, I was of the opinion that there was a combine among the sewer builders and the manufacturers of sewer pipe; so I immediately instructed Mr. Moody, who was my deputy commissioner,

543 to write and get a list of the different kinds of sewer pipe and the names of the manufacturers, so that we could make tests of the different kinds of sewer pipe, and he did so, and we got a number of them from different factories, and we sent the samples to the Illinois University at Champaign, and I instructed the professors there to have tests made. Each sample bore a different number, and they reported the results to us of the tests by number. I instructed them that we wanted to have no pipe that was not absolutely perfect, absolutely safe, and they returned as the result of their tests, if I remember, seven or eight pipes of different manufactures that they reported favorably upon as being absolutely perfect and safe, and the balance they rejected.

Q. After that what action did you take?

Q. Well, I then instructed the sewer department not to allow in any of the pipe that had been rejected, but that any that had passed the tests that I had ordered made should be accepted by the inspectors, and that any one in the sewer business could use them on city's work under their contracts; that they should be accepted by

our inspectors and not rejected, as I understood they had been. I gave them permission to do that.

Q. About what time was that, Mr. Kent?

A. That was during the summer of 1895.

544 Cross-examination.

Mr. WALKER:

Q. I did not understand the question or the answer, more particularly the answer, but did you state what the specifications required prior to the time you went into the office?

A. My remembrance is——

Q. I asked you if you stated it in your answer.

A. Did I state that?

Q. Yes.

A. I don't remember.

Mr. McFEE: He said the specifications were in such shape that nothing but Akron pipe would do.

Mr. WALKER:

Q. Well, I am simply asking you now whether you have made a statement as to the requirements in the specifications at the time you found them in the office, at the time you took charge of it.

A. I did not use the exact language of the specifications; no, sir.

Q. You did not say then and do not now say that under the language of the specifications that the pipe used in the main sewers in Chicago must be made at the Akron manufacturers?

A. I do say that was the case in 1895, prior to my term of office.

Q. That that was a part of the specifications?

A. The specifications read in there "Akron pipe"——

Q. Wait a moment. I am going to object to your stating the contents of specifications because they can be brought in, can they not?

A. I think so.

Q. They are here at the office. Now, I ask if you made the statement which I first asked you, because if you did I move to strike it out.

545 Mr. McFEE: I object. I submit it is not competent to ask him if he said so and so. What he said, why we ought to remember.

Mr. WALKER: I did not hear his answer distinctly; he spoke rapidly and I did not hear it.

Mr. McFEE: I have no objection to his restating his answer.

Mr. WALKER:

Q. I ask you if you stated in your answer what the specifications required as to the quality of the pipe prior to 1895?

A. I answered by saying that I could not give the exact language of the specifications; no, sir.

Q. Who was the superintendent of sewers under you?

A. Mr. Clausen.
Q. Were you ever acquainted with Davidson?
A. Davidson?
Q. Yes.
A. I probably was.
Q. Do you remember when he was superintendent of sewers?
A. Not during my period as commissioner of public works; no, sir.
Q. Prior to that time?
A. After that time, I believe.
Q. Will you look on that form of specifications relative to pipe? I ask you now if you can state when that was in force.
A. Well, that was made up—you see the specifications change some. It came into force since the legislature passed the bill providing in there for a board of local improvements, consisting of several city officers.
Q. Do you remember when that was?
A. I think that was the last legislature, if I remember correctly.
546 Q. Mr. Kent, who was your purchasing agent?
A. My purchasing agent, Mr. Jenny, George L. Jenny.

P. M. FINSTHWAIT, a witness called on behalf of the defendant, being first duly sworn, was examined in chief by Mr. McFee and testified as follows:

Mr. McFEE:

Q. State your name.
A. F. M. Finsthwait.
Q. Where do you reside?
A. 854 Burling street, Chicago.
Q. What is your present business?
A. Sewer inspector for the city of Chicago.
Q. How long have you occupied that position?
A. Well, with the exception of a year and a half, since 1887.
Q. When did the year and a half intervene?
A. June or July, 1895 to 1897.
Q. Do you know what is understood by the term "standard Akron pipe"? State what it is.
A. Shale, cylindrical straight, proper thickness, and well-glazed pipe.
Q. What were your duties as inspector of sewers?
A. I was not an inspector of sewers: simply an inspector of pipe.
Q. Pipe for what purposes?
A. Main sewers.
Q. What were your duties? What are your duties?
A. To see that the pipe used in main sewers were up to specifications. I visited every ditch. If a pipe was put in a ditch I would go there and see if it was up to the standard.
Q. Was there any pipe placed in the main sewers in the city of Chicago or is there that does not pass your approval?

547–559 A. No, sir.

Q. Has it been during the time that you have held office?

A. No, sir.

Q. Then the term "standard Akron pipe" means what? I would ask that again.

A. It means round, straight, proper thickness, vitrified, and glazed.

Q. And does it mean pipe manufactured in any peculiar locality?

A. No, sir.

Q. Not by the phrase "Akron pipe"?

A. Well, it never was in the specifications since I was the sewer-pipe inspector.

* * * * * * *

560 THOMAS CONNELLY, one of the defendants, sworn as a witness on his own behalf, testified as follows:

Direct examination.

Mr. COGHLAN:

Q. State your name.

A. Thomas Connelly.

Q. Where do you reside, Mr. Connelly?

A. 276 Loomis street.

Q. What is your business?

A. Dealer in sewer pipes.

Q. How long have you been engaged in the business of dealing in sewer pipes?

A. About twenty-one years.

Q. During all that time where have you been doing business?

A. Right in the city of Chicago.

Q. You are one of the defendants in this case, Mr. Connelly?

A. Yes, sir.

Q. Now, during the twenty-one years that you have been in business—or take the years preceding the year 1896, say—what class of pipe have you been handling, if any?

A. Akron sewer pipe.

Q. I will ask you if you had been handling Akron sewer pipe exclusively up to that time.

A. No, sir.

Q. What other grades of pipe, if any, did you handle?

A. I handled some from Utica.

Q. Up to 1895?

A. No; not to 1895.

Q. Well, I am asking you prior to that time.

A. Yes, sir.

Q. You handled pipe from Utica?

A. Yes, sir; small pipe.

Q. I call your attention specifically to the years between 1893 and

1896, and I will ask you if you know what kind of pipe was used in municipal contracts in the city of Chicago.

A. Akron sewer pipe.

561 Q. Prior to that time, during your experience, what was the grade of pipe used?

A. Akron sewer pipe.

Q. Do you know if any other grades or qualities of pipe were used in municipal contracts in the city of Chicago prior to the year 1895?

A. No, sir.

Mr. McFEE:

Q. Do you know what the question is?

A. I don't know of any pipe being used outside of the Akron pipe in public contracts.

Mr. COGHLAN:

Q. How much Akron pipe did you usually handle in connection with your business?

A. Oh, some years double than other years.

Q. Well.

A. On an average, 300 cars—350; some years I ran as high at 700 cars.

Q. How much would that amount to in money? We will take 300 cars per year as an average. How much money would that amount to?

A. Well, about $600 per car; you can count that.

Mr. McFEE:

Q. Gross?

A. Gross; yes, sir.

Mr. COGHLAN:

Q. Now, do you know anything about where this standard Akron pipe was manufactured?

A. Yes, sir.

Q. Yes; where was it manufactured?

A. In the Akron district in and about Akron.

Q. Do you know the manufacturers that were engaged in manufacturing the Akron sewer pipe?

A. I think so.

Q. Will you state them to the jury?

A. Yes, sir.

Q. Will you state the manufacturers to the jury?

A. The names?

Q. Yes; the names of the firms.

A. The Buckeye Sewer Pipe Company, the Summit Sewer
562 Pipe Company, the National Sewer Pipe Company, the Hill Sewer Pipe Company, the Akron Sewer Pipe Company, the Robertson Brothers Sewer Pipe Company, and the Crown Fire Clay Company.

Q. Did the Crown Fire Clay Company manufacture what was known as standard Akron pipe?

A. They manufactured a shale pipe.

Q. Did it pass the city inspection?

A. Yes, sir.

Q. I will ask you if those were about all the manufacturers manufacturing standard Akron pipe between the years 1893 and 1896.

A. I believe so; yes, sir.

Q. I believe you left out Camp & Thompson?

A. Camp & Thompson.

Q. You meant to include them?

A. Yes, sir; and Mr. Camp, at Greentown.

Q. Was he manufacturing what was called a standard Akron pipe?

A. Well, he manufactured what was called a shale pipe, and he manufactured what was sometimes called a fireclay pipe. He had both banks of clay.

Q. Will you explain to the jury what was meant by standard Akron pipe?

A. They are a peculiar pipe made out of a shale clay found largely in the vicinity of Akron—shale, made out of shale.

Q. What is shale, now?

A. Well, I couldn't give you the legal definition of it. I know what shale is

Q. What is your understanding? What is your knowledge of it?

A. It is a sort of clay that the action of the weather—that it disintegrates by the action of the weather. It is altogether
563 different from a fireclay.

Q. I want to know what a fireclay pipe is.

A. Well, it is made out of a cheap sort of fireclay that is found by the banks of the Ohio river.

Q. Is there any difference in the manufacture?

A. It is manufactured by the same machinery and the same process, but there is a difference in the color.

Q. Now, prior to the year 1893, did you do business with all those manufacturers?

A. At Akron?

Q. Yes; all those that you have manufactured?

A. More or less; yes.

Q. And how long prior to that time?

A. Oh, since that time to January, 1878; in the fall of 1878.

Q. Then your dealings prior to 1893 were distributed between mostly all of those manufacturers whom you have mentioned?

A. Yes, sir.

Q. What was the case after 1893?

A. After 1893 the pipe all came from the Union Sewer Pipe Company.

Q. Could you do business with anybody else but the Union Sewer Pipe Company in the products known as the standard Akron pipe?

A. No, sir

Q. Now, did you have any dealings with the Union Sewer Pipe Company?

A. Yes, sir.

Q. Did you know Mr. Hill?

A. Yes, sir.

Q. What position did Mr. Hill hold in the Union Sewer Pipe Company?

A. He was the president at one time; I think in 1893?

Q. Yes. At the beginning of the organization?

564 A. Yes; I think so.

Q. Did you meet Mr. Hill in Chicago here in the year 1893, and have any conversation with Mr. Hill relative to the organization of the Union Sewer Pipe Company?

A. Yes, sir.

Q. Just state what that conversation was—what Mr. Hill said and what you said.

A. Mr. Hill called us together at the Tremont house, I think it was some time in March.

Mr. McFEE:

Q. Was Mr. Dee there?

A. Yes, sir; Mr. Williams was there.

Mr. COGHLAN: Just state who was there.

A. Well, I think Mr. Dee was there and Mr. Williams was there. Now, I don't remember whether this gentleman on the South Side, Mr. Evans, was there or not, but I think there were three of us. I rather think there were three of us, because we were handling the Akron pipe at that time, the bulk of us.

Q. Now, just state what Mr. Hill said and what you said.

A. Well, we got together and we talked the situation over, and he said, "Now, we have formed an organization now, and we are going to make some money, and we want you fellows to make some money, too."

Q. What else, if anything, did he say?

A. That was the purport of the conversation.

Q. Now, did you meet Mr. Hill after that and have any talks with him about the organization?

A. Oh, we met often. Every time that he came to Chicago he called in and we used to go out and have a good talk together.

Q. What, if anything, did Mr. Hill say at those good times in reference to the organization of the Union Sewer Pipe Company?

A. He always said it was a good thing—it was a good thing—and we were going to make some money and we were to get together and behave ourselves—the dealers here—and we were going to make some money, too.

565 Q. In other words, he wanted you to organize yourselves here and help them in the scheme?

A. Yes, sir; we were to act in unison.

Q. Now, did you enter into any contracts with the Union Sewer Pipe Company?

A. I believe at a meeting held at the Tremont house there was a form of contract. I think I had a copy. I gave it to you.

Q. I will ask you if that (indicating) is one of the contracts you refer to.

A. This (indicating) is the one before that.

Q. I will ask you if the one before that was one substantially the same as that.

A. I gave it to you. It is dated 1893——

Q. But that (indicating) is one of the contracts?

A. It was made in the Northern hotel, in the presence of Mr. Buel. I think Mr. Robinson was there, Mr. Gibbs, Mr. Dee.

Q. Did Dee sign a contract the same as this that you have?

A. I could not swear whether he did or not, I am sure.

Mr. COGHLAN: I offer it in evidence.

Mr. WALKER: I don't know what bearing that has upon the case. I object to it. It is the same as the other contract. I mean the same as the one with Dee.

Mr. COGHLAN: Yes, sir; it is practically the same as the one with Dee, and it is the contract out of which arose the giving of the notes in question. It shows the terms of settlement, and it also shows the rebates, etc., that were to be paid—that were to be given the boys if they sold their pipes exclusively. It is very material in this inquiry.

The COURT: Objection overruled.

Mr. COGHLAN: The contract is as follows:

Whereupon Mr. Coghlan read said contract in evidence in words and figures as follows, to wit:

566 Memorandum of agreement made and entered into this 20th day of August A. D. 1895, between the Union Sewer Pipe Company of the city of Akron, county of Summit, and State of Ohio, party of the first part, and Thomas Connelly of the city of Chicago, county of Cook, and State of Illinois, party of the second part, witnesseth:

The party of the first part agrees to sell and deliver to the party of the second part, sewer pipe free on board cars at its factories, at the following discounts off the western price-list, to wit:

| | |
|---|---|
| First-class socket pipe from 2″ to 20″ inclusive | 85 % |
| 24″ socket pipe | 80 % |
| 6″ and 9″ ring pipe, with rings | 85 % |
| 10″ and larger ring pipe, with rings | 75 % |
| All sizes second-class socket pipe | 90 % |
| All sizes second-class ring pipe, and rings | 87½ % |
| All sizes second-class ring pipe, without rings | 90 % |
| Ring cull pipe with rings | 85 % |
| Ring cull pipe without rings | 87½ % |

All shipments by said first party in any one month to be settled for by note or acceptance of the second party payable at bank in Chicago, in ninety (90) days from the tenth (10th) of the month following the month in which shipments are made, or if preferred by said second party, settlements may be made in cash by the tenth

(10th) of the month following the month in which the shipment is made, and for such cash settlement an additional discount of two (2%) per cent. on the net amount may be deducted from the bill; but, in no cases will the said first party accept city or town warrants in settlement of said shipment.

567 In consideration of the foregoing agreement, the party of the second part agrees to purchase and handle exclusively the sewer pipe handled and sold by the first party, except when the first party is unable to furnish the party all orders for sewer pipe that they, the second party may make.

In consideration of receiving the entire trade for sewer pipe, from the party of the second part, it is agreed by the party of the first part, that a rebate of one (1%) per cent. of the gross sales be allowed said second party. Said rebate to be paid second party at the close of each year, provided the terms of this agreement have been faithfully carried out.

It is further agreed between the said first and second parties, that said first party will supply said second party seventy-five car-loads of socket pipe of sizes two to twenty inch inclusive at 87½% discount f. o. b. works. The above rebate of one per cent. (1%) not to apply on the pipe sold at 87½% discount.

The said second party further agrees to sell on and after Sept. 1, '95, all sewer pipe purchased from the party of the first part free on board cars in car-load lots, or at their respective yards or places of business in the city of Chicago or Cook county, at the following discounts from the western price-list, viz:

| | |
|---|---|
| 6" and 9" ring pipe with rings and socket pipe up to and inclusive 20" on yard | 70 % off list. |
| 24" socket pipe on yard | 60 " " |

By car-loads, f. o. b. cars in Chicago:

| | |
|---|---|
| 6" and 9" ring pipe and rings and socket pipe up to and including 20" | 75 % " |
| 24" socket pipe | 67½% " |

But in no case shall second- or culls be shipped by first party for use within the corporate limits of the city of Chicago.

568 Upon receipt of satisfactory evidence of violation of the terms of this agreement, by said second party, it is agreed between the first and second parties that it remains optional with the first party to cancel this contract with the second party and the first party will refuse to sell pipe to party of the second part.

This contract may be terminated by either party giving the other thirty days' written notice of such desire.

In witness whereof we have hereunto affixed our hands and seals on the day and date first above written.

THE UNION SEWER PIPE COMPANY.
B. W. ROBINSON, *Sec'y.*
THOMAS CONNELLY.

(Said paper was for identification marked "Def't's Ex. 3.")

569 Mr. COGHLAN:

Q. Now, there was also another contract similar to that that was entered into before that date?

A. Yes.

Q. That is the contract you say you gave me?

A. Yes.

Q. Which I possibly mislaid. We may get it a little later on. (Counsel picks up paper and shows same to the witness.) I will ask you if that is the contract.

A. Yes, sir; that is the contract.

Q. I will ask you if that was the first contract you entered into and was entered into at the time that Mr. Hill came here—the president of the Union Sewer Pipe Company.

A. Yes, sir.

Mr. COGHLAN: It is practically the same, your honor, in form. So we will dispense with the reading of it.

(Said paper was marked for identification "Deft's Ex. 4.")

Mr. COGHLAN:

Q. Do you know if Mr. Dee entered into a similar contract to that?

A. I presume so.

Q. You don't know of your own knowledge?

A. Well, we talked the matter. I don't know that I saw Mr. Dee sign it.

Q. I am just asking you for your own knowledge.

A. No, sir.

Q. Did the Union Sewer Pipe Company carry out that contract or either of them?

A. They did not carry it out at all.

Q. In what respect did they fail to carry out that contract?

Mr. WALKER: I object to your going further into that. We are not sued for damages for breach of that contract.

Mr. COGHLAN: We are not claiming damages.

570 The COURT: Objection sustained.

To which ruling of the court the defendants, by their counsel, then and there duly excepted.

Mr. COGHLAN:

Q. I believe that you answered that they did not carry out that contract.

A. No, sir.

Q. I asked you, Mr. Connelly, this question. I believe that you said that they did not carry out this contract, and you answered "No, sir." Do you mean to say that they carried out the contract or they did not?

A. They did not.

Q. Now, what did they do?

*Q.* The Union Sewer Pipe Company, with reference to this contract?

Mr. WALKER: To that we object.
The COURT: The objection is sustained.

Mr. COGHLAN:

Q. Coming back to the year 1893, or just prior to the formation of the Union Sewer Pipe Company, what, if any, contracts did you have with any of its constituent companies?

A. In December, 1892, I was at Akron and in Cuyahoga Falls, which was five miles from Akron. I met Mr. Camp and Mr. Thompson in their office, and in the conversation we had they told me——

Q. Omit the conversation.

—. I made a contract with Camp & Thompson for 200 car-loads of what is known as city-inspected pipe, to be delivered during the year 1893.

Q. At what price?

A. Eighty off the western price-list.

Q. Did you have any conversation subsequent to that with any of the officers of the Union Sewer Pipe Company in reference
571 to that contract?

A. Yes, sir.

Q. Just state. Did you state that?

A. I spoke with Mr. Hill about it. I spoke to the officers down at the main office, at Akron.

Q. What did they say about that contract, if anything?

A. They said I should order nothing but Akron pipe.

Q. Well, I mean what, if anything, did they say about the Union Sewer Pipe Company undertaking that contract?

A. The Union Sewer Pipe Company, the representatives of the company with whom I was treating, came up to Chicago immediately after the formation of the Union Sewer Pipe Company and said to me, "Look here, Connelly; you have been trading with us for years now. The Union Sewer Pipe Company has assumed this contract, and we want you still to continue ordering from us, and when you write to the Union Sewer Pipe Company, why, we wish you would specify to Mr. Hill and say 'the Buckeye' or 'the Summit.' Mr. Buel would say the same thing to me: 'I wish you would specify the National.'" That was the conversation.

Q. Did the Union Sewer Pipe Company undertake to make any shipments under that contract?

A. Yes, sir.

Q. How many cars did they ship under that contract?

A. Two hundred and fifty-five, I think, of city pipe and between six and seven hundred car-loads of socket pipe.

Q. I think you misunderstand my question. I am asking you with reference to this contract for 200 cars that you say you made with Camp and Thompson and which was subsequently assumed by the Union Sewer Pipe Company.

A. We treated with them.

Q. Did they make any shipments on that 200-car order?

A. Yes, sir.

572 Q. Well, how many cars did they ship under that contract at the price you made with Camp and Thompson?

A. Not one. Yes; they shipped some, I think, in 1894, but not one in 1893.

Q. They shipped some, you say, in 1894?

A. In 1894.

Q. At what price?

A. At eighty off.

Q. How many cars did they ship in 1894 at eighty off?

A. I could not tell you from memory. I have a memorandum of it and invoices of it in the office.

Q. You have?

A. Yes, sir.

Q. Did you ever have any conversation with any of the officers of the Union Sewer Pipe Company as to why they did not ship all of the cars called for in that contract?

A. Yes, sir.

Q. With whom did you speak?

A. I spoke with Mr. Buel, Mr. Henry Robertson, and Mr. Gibbs.

Q. What position did Mr. Buel occupy in the Union Sewer Pipe Company?

A. I think he was secretary or treasurer; I don't know which.

Q. Well, just state the conversation you had with him, what you said on this subject. I am asking you about those 200 cars, do you remember?

A. About the 200 cars?

Q. Yes.

A. Well, they insisted that I should handle—order nothing but Camp pipe, Camp & Thompson pipe, and the remark that he made to me at one time I was down there was, "If you had been trading with us exclusively we would have taken care of you; we would see that you would be taken care of."

573 Q. Did you ever make any claim of overcharge for pipe?

A. I was always kicking about it.

Q. Whom did you make the claim to?

A. To the management of the company.

Q. The Union Sewer Pipe Company?

A. Yes, sir; and every time I was in Akron I was kicking about it.

Q. What did they ever say?

A. I never got any satisfaction.

Q. Did they offer to recognize your claim?

Q. They offered me once as much as $2,000 if I would give up—if I would give up those notes.

Q. What was that $2,000.00 for?

Mr. WALKER: It would seem, your honor, that they have gone as far in this matter as they are entitled to under the ruling of the court. The witness has testified that this contract with Camp &

Thompson was assumed by the Union Sewer Pipe Company, and that they refused to carry out that contract and deliver the pipe according to specifications and prices.

The WITNESS: Yes, sir.

Mr. WALKER: That fact, your honor, permitted them to prove in the Dee case yesterday, but to open up the whole matter——

Mr. COGHLAN: I don't intend to, Mr. Walker.

The COURT: I don't know whether this inquiry in regard to the $2,000 is pertinent to the issue, Mr. Coghlan, is it?

Mr. COGHLAN: Only in this way, that Mr. Connelly made this contract with the Union Sewer Pipe Company, as the record shows; that they assumed it; that they failed to carry it out—and at all times during the last—during the three years of their existence they attempted to adjust this matter with them.

Mr. McFEE: The claim was recognized.

574 The COURT: I think that is immaterial.

Objection sustained; to which ruling of the court the defendants, by their counsel, then and there duly excepted.

Mr. COGHLAN: Your honor, there is no question that is objected to.

The COURT: Didn't you raise an objection (to Mr. Walker)?

Mr. COGHLAN: Mr. Walker objects to our going any further along those lines.

The COURT: The objection is sustained.

Mr. McFEE: The objection is sustained that we don't go any further?

The COURT: Yes.

Mr. McFEE: I object to that, inasmuch as it is not an objection to a question.

Mr. COGHLAN:

Q. I will ask you to look at that and state what it is. (Hands witness a typewritten letter.)

A. Yes, sir.

Q. What is that (indicating), a *a* letter that you received in the ordinary course of business?

A. Yes, sir.

Q. Who is it signed by?

A. J. A. Baldwin.

Q. Who was Mr. Baldwin?

A. He was the president, as I understand it, of the Buckeye Sewer Pipe Company.

Q. Was the Buckeye Sewer Pipe Company one of the constituent companies in the Union Sewer Pipe Company?

A. Yes, sir.

Q. And that is Mr. Baldwin whose testimony was read in court yesterday?

A. Yes, sir.

Q. Afterwards president of the Union Sewer Pipe Company?

A. I believe so; yes, sir.

Q. I ask you what that is. (Shows witness another paper.)
575 A. It is a letter from Mr. Baldwin, at Akron, the president of the Union Sewer Pipe Company.

Mr. WALKER: Do you offer these in evidence?
Mr. COGHLAN: Yes, sir.
Mr. WALKER: We object to that, sir. It is not written by Mr. Baldwin as the representative of the plaintiff company, but it is in the name of the factory named in the heading of that letter. I object to this particular letter.
Mr. COGHLAN: This letter is written by Mr. Baldwin at the time that he was president of the Union Sewer Pipe Company, and it is signed "J. A. Baldwin." It does not state his official capacity, but it is written upon the letter-head of the Buckeye and Summit Sewer Pipe Company, and it refers to the business of this company in Chicago. Of course, this company is one of the constituent members of the Union Sewer Pipe Company.
The COURT: Objection sustained as it was yesterday.
Mr. MCFEE: Your honor does that without seeing the letter and knowing its contents?
The COURT: Yes, sir.
To which ruling of the court the defendants, by their counsel, then and there duly excepted.

(Said document was marked for identification "Def't- Ex. 5.")

Mr. COGHLAN: I will just read this letter to you, gentlemen. (Reads:)

"Office of the Union Sewer Pipe Company, Standard Akron Pipe Company.

AKRON, OHIO, *April 29th*, 1896.

J. A. Baldwin, president; George R. Hill, vice-president; Chas. Baird, treasurer; B. W. Robinson, secretary; Akron Sewer Pipe Company, Buckeye Sewer Pipe Company, Harry Thompson,
576 Crown Fire Clay Company, The Hill Sewer Pipe Company, The National Sewer Pipe Company, Pennsylvania Sewer Pipe Company, Limited, The Robinson Bros. Company, and the Summit Sewer Pipe Company.

Dictated by J. A. B.

Thomas Connelly, Esq., Chicago.

DEAR SIR: We are informed that certain of our Chicago dealers in Akron pipe, to increase their profits, or for other reasons, are taking advantage of the reputation of the Akron pipe and handling other inferior grades and selling them as Akron pipe, thus deceiving the trade and injuring the reputation of the Akron pipe. For a time, to meet such competition, we sent to your markets some of our second-class pipe, which we now see was an injury to us which we do not propose to longer endure.

The city of Chicago demands first quality of pipe, as shown by

the inspection given them, and it is our ambition to meet their demands. We cannot longer jeopardize the reputation of the Akron pipe by placing it in the hands of dealers who keep in stock and handle other makes of Akron pipe. Hence, unless you promise to handle our pipe exclusively, we cannot afford to place our pipe in your hands. We cannot thus risk the reputation of our pipe.

Please advise us promptly whether it will meet with your pleasure to handle our pipe exclusively, that we may be governed accordingly.

Yours truly,

THE UNION SEWER PIPE COMPANY,
By J. A. BANDWIN, *President.*"

577 Mr. COGHLAN: On the letter is, "Address all correspondence to the company."

(For identification same is marked "Def't's Ex. 6.")

Mr. COGHLAN:

Q. What, if any, conversation did you have with any of the officers of the Union Sewer Pipe Company in reference to selling their exclusive product during those years?

A. I sold no other during those years but Akron pipe.

Q. Did they charge you with selling anything else?

A. No, sir; they charged some others and I tried to get me to investigate who they were.

Q. Why didn't you pay those notes?

Objected to. Objection sustained.

Cross-examination.

Mr. WALKER:

Q. Mr. Connelly, you were one of the pioneers in the pipe business in Chicago?

A. No, sir; not pioneers; there are two or three here that are older than I am in the business.

Q. Who?

A. The Dee family and Mr. Williams was in the business before I came to Chicago.

Q. And the Akron factories were about the earliest factories started near Chicago; is it not a fact?

A. I don't know about that. There was one started over here in Michigan, but I cannot tell you what date.

Mr. COGHLAN: Excuse me, Mr. Walker; there are one two or questions that I want to ask Mr. Connelly that I omitted to ask.

Mr. WALKER: All right; go on now.

578 Further direct examination.

Mr. COGHLAN:

Q. Do you know about the Union Sewer Pipe Company maintaining an agency here in Chicago?

A. During the years 1893 to 1896 they did not maintain it to 1896. They maintained it in 1893, and I think to about 1894.

Q. Who was their agent here?

A. N. A. Williams Company or N. A. Williams.

Q. Did you ever tax them with keeping an agent here in Chicago?

A. Certainly.

Q. And what did they say?

A. Why, they claimed when I went down—when I was told first about it I would not believe it. I told the man that told me about it—why, I said, "You don't know what you are talking about," and when I went down to Akron I put it to them and asked them about it, and they said to me, "I thought you knew about it;" and I said, "No, I did not; it is a breach of faith;" and he said we kicked about it, but Mr. Hill had his own way about it and we put Mr. Williams there.

Q. What was the effect of that agency on the sewer-pipe dealers in Chicago?

Objected to by plaintiff; which objection was by the court sustained, and to which ruling of the court defendant, by his counsel, then and there duly excepted.

579 Cross-examination continued.

Mr. WALKER:

Q. Then, during all those years from 1893 to 1896 the Union Sewer Pipe Company kept Williams as its agent here in Chicago?

A. No, sir; I did not say so.

Q. Well, up to what time?

A. Up to 1894, to my own knowledge.

Q. Beyond that you don't know?

A. No, sir; unless——

Q. Well, he sold pipe to different parties in Chicago and was a competitor of yours—Williams?

A. Yes, yes.

Q. He was your competitor?

A. Yes, sir; we were all competitors, selling Akron pipe.

Q. Now I come back to the Akron manufacturers. They were the earliest in the market here, were they not, in Chicago?

A. They were before I came to Chicago.

Q. It was a convenient market—that is, a convenient distance from their factor-es?

A. Oh, there were factories a good deal nearer.

Q. Afterwards?

A. Oh, yes, sir; and before.

Q. Before they started?

A. No, no; I could not say before they started. No, no; that is before my time in the pipe business.

Q. Now, you have spoken of this Standard Akron pipe. We, of course, know it is a most excellent pipe.

A. It is no better than any other people's; not a bit.

Q. How?

A. I have been in the pipe business, manufacturing pipe, from 1868. I know something about what pipe is.

Q. What did you say? Did you say it was no better than others?

A. I say there is as good pipe in the marcet, and there has
580 always been as good pipe. It is only a matter of test.

Q. Always as good pipe in the market as the Akron standard?

A. Yes, sir, and in all other markets, and I have sold it myself in Buffalo, Pittsburgh, and in other markets.

Q. Well, pipes of equal quality and a higher standard have been sold here in the market during all these years?

A. No, sir; I did not say so. Other markets.

Q. Do you mean to say that there has been no pipe sold in Chicago except this Union pipe or the standard Akron pipe?

A. In public sewers.

Q. I am not talking about public sewers. I am talking about the market.

A. I mean to say that the Akron furnished——

Q. Answer the question. Now, do you mean to say that the standard Akron pipe, as that was the only pipe sold, upon the market in Chicago during these years, that I have asked?

Mr. McFEE: I object; it is not a part of the issue.

The COURT: Answer the question.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

The WITNESS:

A. They were not the only ones.

Mr. WALKER:

Q. There were several others—several other brands of pipe that were being sold upon this market?

A. No, sir; not several.

Q. Well, how many?

A. There was some small pipe from the Ohio river sold from 1878, before I came to Chicago, and there was some small pipe from Michigan sold from the city of Chicago.

581 Q. Well, prior to 1893 did you deal in any pipe except Akron pipe?

A. Yes, sir; lots of other pipe.

Q. And after 1893 did you deal in any other pipe?

A. No, sir.

Q. After 1893 you did not?

A. No, sir.

Q. You lived up to this contract?

A. Tried to. I have always lived up to every contract I make.

Q. Now, what is the trouble with the Columbus pipe?

A. It is a poor pipe; the poorest pipe, in my judgment, in the market.

Q. What about Camp & Thompson's pipe?

A. I never had any trouble with them any more than the balance in Chicago.

Q. Well, does that belong to the Akron district?

A. Yes, sir; known as the Akron district.

Q. Suppose it was stamped "Akron pipe," would it sell as they sell Akron standard pipe?

A. Akron pipe has been rejected because there was no brand on it here; nothing more, to my knowledge. There was no brand on it, and it was as good pipe as any of them.

Q. They depended upon the brand and not inspection? These inspectors will——

A. The inspection, as I said to the commissioner of public works, depended a good deal on how you treated them.

Q. How you treated them?

A. Yes, sir; a good deal.

Q. So if the dealers in the Akron pipe treated them kindly, why the Akron pipe would pass inspection?

A. The Akron folks had not to treat them; it was the dealers here that had to treat them.

Q. The dealers?

A. Yes, sir; we had to do it.

Q. You could not get along without it?

A. Not very well.

Q. And you have to do it still?

582 A. No, sir; I must say that since the bars were let down there is very little of that, but previously there was a good deal of it.

Q. I would like to know when the bars were let down and when these gentlemen became perfectly honest?

A. When we had the tests made, and tests of other pipe beat the Akron pipe, in many instances Mr. Kent said this pipe has got to stay, and he let other pipe go into the market.

Q. Now, about the time Hill came on here and met you gentlemen dealers up here at the hotel you had a conference here over the situation?

A. Yes, sir.

Q. A kind of love business such as they have at Springfield?

A. No, sir; I never had much kindly feeling towards Mr. Hill from the way he treated me.

Q. Now, for some time the manufacturers were struggling, as well as the dealers had been. Business was pretty rough and rocky, had it not been?

A. I suppose so.

Q. The trade was very profitable?
A. No, sir; I cannot say it was very profitable.
Q. There was not very much money in it for anybody?
A. For us dealers; no, sir.
Q. So Hill told you that they were going to get together and see if they could not make some money?
A. That was his conversation.
Q. And so you got into this conversation up here?
A. I think so.
Q. But at all events you came to an understanding?
A. Yes, sir; we had a friendly talk about it.
Q. And he told you that they had formed a combination down there?
583 A. They had formed a pool, he said.
Q. A pool?
A. Yes, sir; a pool.
Q. And he suggested that the dealers here get together?
A. Yes, sir; that was his idea. It would be a good idea if we got to working together.
Q. Did you try it?
A. Yes, sir; but we were always fighting; everybody was fighting to get the thing.
Q. And fighting cost you money?
A. Yes; it cost us money.
Q. Now, here is a thing that I don't understand Connelly, now you say that this pipe must all bear the ear-mark of the standard Akron in order to pass the scrutiny of these inspectors. Some of them have been on the witness stand. Here was one company that was organized in Pennsylvania and making pipe in Pennsylvania that was sold by the Union Company?
A. I never saw it.
Q. Why, it was read over as one of——
A. I know, but I never saw the pipe.
Q. Now, would you know it from Akron pipe if it was stamped Akron?
A. I would know whether it was a shale pipe or a fireclay pipe or made of potash.
Q. The shale pipe that would be of the Akron pipe on account of the material used?
A. Yes, sir.
Q. Were all these companies that entered into that combination making pipe of shale material, of the shale?
A. I think so, with the exception of Camp & Thompson; they made some out of fireclay.
Q. Camp & Thompson were at——
A. Camp & Thompson were not at — at this time because
584 they were dissolved, and when they made some for us they made some out of fireclay and *sut* out of a mixture of fireclay and shale.
Q. You spoke of an arrangement that you had with the officers

of the company, of the Union Company, relative to delivering you a certain number of cars at 75 % off.

A. 80 % off.

Q. There was no adjustment of that account at all?

A. I tried to get it adjusted.

Q. No allowance made you in settlement of this claim or any part of it?

A. There may be in some part of it, but not in the claim of 1893.

Q. You had no other claim, had you?

A. Oh, yes; I was always claiming. I am a chronic kicker.

Q. That was characteristic of the Chicago dealers; they are good kickers.

A. They are, and I believe I was about as good a kicker as the bunch of them.

Q. I believe so. Dee himself could kick a little

A. Yes, sir; I suppose he knows a little about that, too.

Q. Now, I am talking about these cars that Camp & Thompson were to give you, and that afterwards that that contract was assumed by the Union Company. Now, a part of those cars were all furnished you, but not at the price, you say.

A. I have invoices of 27 or 28 car-loads from Camp & Thompson marked "Invoice number three," by which to designate the number of them, from Camp & Thompson, and I am charged 75 % off from them, just the same as the balance, making no pretense to fill my order on the contract.

Q. What I am getting at is this: In the settlement that was made afterwards, wasn't there an allowance made you of $1,000?

585–591 A. That was for shortage and cullage and breakage, and one thing and another.

Q. And when did that occur?

A. I think that was in 1894.

Q. You have rendered an account for damages?

A. Yes, sir; but I didn't get off all what I wanted.

Q. And you are kicking?

A. Yes, sir; I am certainly still kicking.

Q. And you still continue to kick?

A. Yes, sir; I am still kicking, and I think there is six or seven thousand dollars due, that I claim, coming to me.

* * * * * * *

592 FRIDAY, *Jan. 26th*, 1900—2 p. m.

Mr. MCFEE: If your honor please, I now ask leave to file two amendments. First, an amendment which is in the nature of a new notice, being the same which I had offered before, with some alterations, which have been submitted to Mr. Walker.

The other amendment I have here, which simply asks the insertion after the word- "common law in the State of Ohio," and we now want to insert "also common law in the State of Illinois."

Mr. WALKER: You file that as your amendment?

Mr. MCFEE: I file this and file the other also. This amendment simply——

The COURT: Only goes to that point?

Mr. McFEE: Only goes to that point.

The COURT: All right; you can have your amendment.

Mr. WALKER: We wish to reserve an exception. We object to the filing of the other amendment, and our objection is overruled by the court, and we except.

Which amendments are in words and figures as follows, to wit:

593 *Notice of Special Defense.*

To the Union Sewer Pipe Company, plaintiff in the above-entitled cause, and to Edwin Walker, Esq., and Herbert W. Hamlin, attorneys for said plaintiff:

Take notice that upon the trial of this cause the defendant will in defense thereto introduce in evidence and rely upon the special facts and matters hereinafter stated—that is to say:

First. That heretofore, to wit, a long period prior to the first day of January, A. D. 1893, the defendant was engaged in the business of a dealer and contractor in sewer and drainage pipe in the city of Chicago; that one of the principal features of the business of the defendant was to furnish and supply a quality of sewer pipe for use by the city of Chicago and to furnish and supply sewer pipe for use by contractors with the city of Chicago for the construction and building of main sewers; that prior and up to the first day of January, A. D. 1893, the said defendant, William E. Dee, and his predecessor in business, William M. Dee, father of the said defendant, were engaged in said business; that prior to the first day of January, A. D. 1893, and for a period of at least five years theretofore and for a period of about five years thereafter the specifications issued by the city of Chicago for the construction of sewers provided that Akron sewer pipe should be used; that at such periods the commodity known as Akron sewer pipe had a trade designation and meaning and was universally understood to mean only such sewer pipe as was manufactured in Summit county, in the State of Ohio, and within a limited district of said county known as the Akron district, and that prior to the first day of January, A. D. 1893, the said
594 sewer pipe was manufactured exclusively by the following firms and corporations, to wit:

Buckeye Sewer Pipe Company, the Summit Sewer Pipe Company, the National Sewer Pipe Company, the Akron Sewer Pipe Company, the Hill Sewer Pipe Company, Robinson Bros. Company, the Crown Sewer Pipe Company, the Camp & Thompson Sewer Pipe Company, the Sperry Sewer Pipe Company, and the Pennsylvania Sewer Pipe Company.

That on or about the first day of January, A. D. 1893, all of the said companies enumerated confederated and combined together unlawfully and contrary to the common law and to the general law and statutes of the State of Illinois and of Ohio and contrary to the general law of the United States of America and of the law of the different States thereof, and contrary to the statutes of the United States of America, for the purpose of

limiting the production of sewer pipe known as Akron sewer pipe, and of the different articles of merchandise manufactured and produced by the said firms and corporations, and for the purpose of increasing the market prices thereof, and for the purpose of preventing competition in the manufacturing, making, transportation, sale, or purchase of said articles of commerce, and for the purpose of fixing standards or figures, whereby the prices of said sewer pipe and articles of merchandise intended for sale, use, and consumption in the State of Ohio and in the State of Illinois and throughout the United States should be controlled and established.

That on or about the first day of January, A. D. 1893, the said firms and corporations hereinbefore particularly named entered into
595 a contract with the corporation known as The Union Sewer Pipe Company, the plaintiffs in this action, whereby they and each of them undertook and agreed to sell all the products of the factories of each of them through the medium of the said Union Sewer Pipe Company.

That the said Union Sewer Pipe Company, under and by virtue of such agreement, notified the said defendant that any and all sewer pipe or other merchandise theretofore manufactured by any of the said firms or corporations and to be manufactured by any of the said firms and corporations could be purchased only from the said Union Sewer Pipe Company.

That by reason of the said combination and by reason of the contract between the said Union Sewer Pipe Company and all of the said firms and corporations the said firms and corporations hereinbefore mentioned undertook and agreed to sell its products only to such persons as were named and designated by the said Union Sewer Pipe Company and to fulfill only such contracts as were made, approved, or accepted by the said Union Sewer Pipe Company.

That after said combination the said Union Sewer Pipe Company alone controlled the entire manufactured product and output of all of the said firms and corporations, and it was impossible for this defendant or any other person or persons whomsoever to purchase any of the commodity known as Akron sewer pipe from the individual manufacturers or in any method other than through the medium of the said Union Sewer Pipe Company.

That after the said Union Sewer Pipe Company in this manner entered into the business aforesaid the price of Akron sewer pipe was raised beyond the reasonable and ordinary price thereof
596 and beyond the prices theretofore prevailing, and an excessive charge for the Akron sewer pipe was thereafter made to this defendant and to others dealing in and requiring said Akron sewer pipe for the purposes of their business and over and above the fair market value thereof.

That at the time of the contracts and agreements between the said Union Sewer Pipe Company and the firms and corporations aforesaid the said defendant was obligated to furnish large quantities of Akron sewer pipe to his customers and to sewer contractors within the city of Chicago.

That the said defendant could not obtain any substitute for the

said Akron sewer pipe, and no substitute for the same existed; and that after the said Union Sewer Pipe Company began the transaction of business it notified this defendant that he must pay the increased prices demanded, and prices unreasonable and in excess of the market value of the said sewer pipe and in excess of the prices prevailing prior thereto, or that said sewer pipe would not be furnished or supplied; that the defendant thereupon, by force of circumstances beyond his reasonable control, and wrongfully and designedly and intentionally brought about solely by the plaintiff, was compelled to obtain the said merchandise and to pay for the same, or to agree to pay for the same, prices largely in excess of the true and real market price thereof, such prices being caused by reason of the said contracts and agreements.

That at the time of the said contracts and agreements between the said Union Sewer Pipe Company and the firms and corporations aforesaid this defendant was a party to a contract between him and the firm of Camp & Thompson, one of the firms entering into
597 said agreement and contract with the said Union Sewer Pipe Company, whereby the said Camp and Thompson agreed to furnish and supply to this defendant three hundred and eight (308) car-loads of the said Akron sewer pipe for the supply of the customers of the said defendant in the said city of Chicago.

That the said Camp and Thompson agreed to deliver the said three hundred and eight (308) car-loads in various installments, and for the purpose of carrying out specific orders and contracts requiring the said aggregate amount of three hundred and eight (308) car-loads between the said contracts, being entered into by the said defendant and various contractors within the city of Chicago, and that the requirements and needs of this defendant of the said three hundred and eight (308) car-loads for such purpose was known to the said Camp and Thompson and to the said plaintiff.

That prior to the said contracts and agreements between the said plaintiff and the said firms and corporations the said Camp and Thompson had made partial shipments under the said agreement to supply the said three hundred and eight (308) car-loads of Akron sewer pipe to the said defendant.

That after the said agreement and contract between the said plaintiff and the said firms and corporations the said plaintiff, The Union Sewer Pipe Company, acquired all of the rights of the said Camp and Thompson in and to the said contract, and assumed and agreed to perform all of the obligations of the said Camp and Thompson thereunder.

That the price at which the said three hundred and eight (308) car-loads were to be delivered to this defendant was at the rate of eighty per cent. (80 %) discount from the western list price, and that this sum equalled the amount of one hundred and twenty
598 ($120.00) dollars a car-load; that the said price of one hundred & twenty ($120) dollars for an average car-load of said Akron sewer pipe was the prevailing market price thereof and was the fair and reasonable value thereof.

That as soon as the Union Sewer Pipe Company made deliveries

to this defendant of portions of the said three hundred and eight (308) car-loads it demanded that this defendant pay an amount equal to seventy-five (75 %) per cent. discount from the said western list price an- aggregating an increased price of thirty ($30.00) dollars for each of the said three hundred and eight (308) car-loads of the said Akron sewer pipe remaining to be delivered.

This this defendant, by force of circumstances beyond his reasonable control, and wrongfully and designedly brought about solely by this plaintiff, was compelled to obtain the said sewer pipe and purchase the same at such prices, which were largely in excess of the real market price thereof and were purchased by reason of the contract between the said Union Sewer Pipe Company and the said firms and corporations, and that this defendant does set off the amount of said increased price on the said three hundred and eight (308) car-loads and on other sewer pipe which this defendant was so forced to purchase for the exigencies of his contracts in the city of Chicago as against the plaintiff's demand in this action.

And you will further take notice that this defendant will urge all of the said defenses in connection with all and singular the other matters and defenses of which you have heretofore been notified, and that this defendant does urge all of the said special
599 matters herein stated in addition and in amendment to all and singular the other matters and things contained in the notice of special defenses and set-offs filed in this cause.

You will further take notice that at the trial of said cause the defendant will give in evidence and insist that heretofore, to wit, on to wit, the 15th day of January, A. D. 1893, he entered into a contract with a certain firm known as Camp and Thompson, manufacturers of pipe known as Akron pipe, with its principal plant and office in Cuyahoga Falls, in the State of Ohio, by the terms whereof the said Camp and Thompson agreed to deliver during the year 1893 three hundred and eight car-loads of pipe known and designated as city pipe, at and for a price equal to eighty per cent. discount from the list price of such pipe.

That such contract was in existence and shipments thereunder were made at the time of the formation of the corporation known as the Union Sewer Pipe Company; that on the organization of the said Union Sewer Pipe Company and the beginning of business by the said Union Sewer Pipe Company the Union Sewer Pipe Company assumed and agreed to perform the said contract.

That after assuming and agreeing to perform the said contract the said Union Sewer Pipe Company made shipments thereunder, but failed and refused to accept the price of eighty per centum from the list price aforesaid, but demanded seventy-five per centum therefrom; that the defendant ordered said pipe for the purpose of fulfilling contracts made in the city of Chicago for the building of sewers, and that he was under the necessity of delivering such pipe, and not pipe of any other quality or standard, in order faithfully to carry out the provisions of such contracts.

600 That by reason thereof the said defendant was duressed into paying a price for said pipe equal to seventy-five per

cent. discount from the list price thereof in lieu of eighty per cent. discount from the said list price, and by reason thereof he sufferred damages to the extent of five per cent. upon each car-load delivered under the terms of said contract; and at the trial of said cause the said defendant will set off the said amount of such differences between seventy-five per cent. and eighty per cent. of such list price for all of the car-loads delivered under the contract aforesaid, and will ask judgment against the plaintiff for the excess of such amount over the amount in this action, if any.

(Signed) JOHN R. McFEE,
O'DONNELL & COGHLAN,
*Att'ys for Def't.*

601–605 Mr. McFEE: We have offered in evidence this case in the 53rd Ohio, page 308, Jackson *et al. vs.* Brick Association.

The COURT: That is not disposed of entirely.

Mr. WALKER: We object to the introduction of that as evidence for the reason that a proper foundation is not laid, and for the further reason that it is irrelevant to the issues in this case.

The COURT: It may go in subject to the objection.

Exception by plaintiff.

Mr. McFee then read to the court said case of Jackson *et al. vs.* The Brick Association, from the 53rd Ohio, and at the conclusion of his reading of said cause the defense rested.

606 Defense rests.

Whereupon the plaintiff introduced in rebuttal the following evidence:

BYRON W. ROBINSON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Mr. WALKER:

Q. What is your name?
A. Byron W. Robinson.
Q. Where do you reside?
A. Akron, Ohio.
Q. What is your present business?
A. Manufacturing sewer pipe.
Q. With what company?
A. Robinson Brothers & Company.
Q. How long have you been engaged in that business?
A. Since 1887.
Q. Are you acquainted with the corporation known as The Union Sewer Pipe Company, the plaintiff in this case?
A. Yes, sir.
Q. Are you or have you been an officer of that corporation?
A. Yes, sir.
Q. What office did you hold?
A. Secretary.

Q. For how long a time?

A. From February, 1893, up to the present time.

Q. Prior to that time were you with the Robinson Company?

A. Yes, sir.

Q. Manufacturing sewer pipes?

A. Yes, sir.

Q. Mr. Robinson, you have heard the name of standard Akron pipe. Do you know where and when that name was first adopted?

A. No, sir; I do not.

Q. How long has that name been known to the trade?

A. It has been known to the trade as long as I can remember.

Q. What peculiar virtues has the Akron pipe over the pipe of other manufacturers, if any?

A. We claim that our pipe is more impervious to moisture; it is more vitreous in texture, and that it is more uniformly good in quality than that made by others.

607 Q. What gives it that peculiar quality, the material that is used?

A. I think the material has something to do with it.

Q. And what else—what besides material?

A. Well, the fact that the Akron manufacturers have been progressive and have good factories—the best machinery.

Q. You may state whether claim of special virtue is denied by other manufacturers.

A. It is denied by other manufacturers; yes, sir.

Q. Something has been said about shale and the superiority of shale over clay. I don't know what shale is. What is it?

A. Well, shale is—geologists say it is Sharon shale, first discovered by—at Sharon, Pennsylvania, and they named it Sharon shale. It is a deposit of clay impregnated with iron. I don't know that it has ever been analyzed. I cannot say what the analysis of the clay is.

Q. Is that the characteristic of the clay that is used by the Akron companies?

A. Yes, sir.

Q. Do you know of any other *county* manufacturing iron pipe that use substantially the same material of shale?

A. Manufacturing sewer pipe? Yes, sir.

Q. Where are they located?

A. They are located at various points in Illinois, Indiana, Michigan, Ohio, Pennsylvania, and New York State. I could name them if you wished me to.

Q. You might name them.

A. The factories that make what is known as shale pipe, as I know of, are as follows: The Chicago Sewer Pipe Company, at Brazil, Indiana; the Streator Manufacturing Company, Streator, Illinois; Monmouth Mining and Manufacturing Company, at Monmouth, Illinois; the Bennett Sewer Pipe Company, of Jackson, Mich-

608 igan; the Macomb Sewer Pipe Company, of Macomb, Illinois; the Columbus Sewer Pipe Company, of Columbus, Ohio; the Sharon Clay Manufacturing Company, of Sharon, Pennsylvania; the Standard Sewer Pipe Company, of Rochester, New York State; Otis

& Gore's line, of Rochester. There may be others. I don't know. I don't recollect others now.

Q. Have you a general knowledge of the capacity of those manufactories?

A. I think I have.

Q. You may state whether it is a substantial—whether they have a substantial capacity or otherwise.

Mr. McFee: I object.

Which objection was by the court overruled; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

The Witness: They have a substantial capacity.

Mr. McFee: What is meant by substantial capacity? In reference to what standard?

Mr. Walker: You know.

Mr. McFee: I don't know in reference to what standard. I don't know what that means—substantial capacity.

Mr. Walker: Take the Columbus factory, do you know its capacity?

A. I do.

Q. What is it?

A. About one thousand car-loads per annum.

Q. The Brazil factory?

A. I am not so familiar with the factories at Brazil. I don't know what their capacity is. There are two of them I know.

Q. Do all these factories that you have named manufacture this sewer pipe from the shale and place it upon the market in this vicinity and in the Ohio market?

A. Yes, sir.

609 Q. Has that been the condition of things for a term of years or not?

A. It has.

Q. Was that the condition in 1890, for instance?

A. Yes, sir; with the exception of the Brazil factories. I hardly think they were running in 1890. I think they were not since then.

Q. Do you remember when that factory was opened?

A. The factory at Brazil, I think, began business in 1892 or 1893. Another one, I believe, began business in 1895.

Q. How many of these factories prior to 1893—say, from 1890 down to 1896—were in the Chicago market with their products?

A. I think four or five of the factories I have named marketed pipe in Chicago, more or less of it.

Q. From 1893 to 1896, state whether the product of these factories was in the market for sale in Chicago.

A. I think the product of three or four of the factories I have named was in the Chicago market during that time.

Q. You were familiar with the Chicago market prior to 1893 and since that date?

A. Yes, sir.

Q. Your firm has been dealing in Chicago prior to 1893?

A. Yes, sir.

Q. And the Union Sewer Pipe Company after 1893—January, 1893?

A. Yes, sir.

Q. Mr. Robinson, a contract has been read to the jury—rather, a draft of a contract—which was entered into between The Union Sewer Pipe Company, plaintiff, and several other companies in Akron and near Akron—your old company, I believe, one of them. Do you remember how many companies entered into those contracts?

610 Q. Do you refer to the contracts made by the Union Sewer Pipe Company?

Q. Yes; for the purchase of the product.

A. I think there were ten companies.

Q. One of those companies, it was in evidence, was located in Pennsylvania?

A. Yes, sir.

Q. Was that a company that manufactured pipe out of shale?

A. Yes, sir.

Q. Was there any difference—substantial difference—in the quality of the goods manufactured by these different companies or in the value of the goods manufactured?

A. I think not.

Q. How is the Camp and Thompson product?

A. The Camp and Thompson pipe was, perhaps, a little inferior. It always sold for a little lower than the market value of Akron pipe.

Q. Speaking of Camp and Thompson, you are personally acquainted with Mr. Connelly, one of the defendants in one of the cases?

A. Yes, sir.

Q. Did you ever have any conversation with him after January, 1893, or any correspondence relative to his receiving on his orders Camp and Thompson's goods or pipes?

A. I believe the company had some correspondence with Mr. Connelly, but I had none.

Q. Have you any copies of that correspondence here?

A. No, sir.

Q. You had no conversation with him about it?

A. No, sir.

Q. Were all of these companies incorporated—these companies that make contracts with the plaintiff for the sale of their pipe?

A. I believe not. I think Camp & Thompson was a copartnership.

611 Q. And the others were?

A. And the others were, I believe, incorporated companies.

Q. You may state whether all these companies—all the companies that entered into these contracts—continued the operation of

their works; prosecuted the work of manufacturing sewer pipe after the contract with the Union Company.

A. They did.

Q. Did any of them suspend work?

A. No, sir.

Q. Did any of them, to your knowledge, decrease the amount of product from what it had been—from the volume of the business, the manufacturing business—as it was prior to the making of the contract?

A. Yes, sir; there has been large increases in the output.

Q. There was large increases after the contracts?

A. Yes, sir.

Q. Was there at any time a decrease—a close of factories, a decrease of the product?

A. No, sir.

Q. Prior to January, 1893, how was the market price of pipe—sewer pipe—used in the city of Chicago?

A. Prior to 1893? Do you mean how was the market price?

Q. Was there a market price, or did it fluctuate and vary?

A. I think it fluctuated. Do you refer to the price that the dealers sold at here in the city?

Q. Well, the price that the dealers sold at or what they had to pay for pipe?

A. Well, the Akron manufacturers had a market price for their pipe when they operated—when they made their own sales. They had a market price which was generally understood among themselves.

Q. Can you state generally what it was? What per cent. off of the card price on an average prior to 1893?

612 A. In 1892?

Q. Yes.

A. The price for city-inspected pipe was 75 off list of Akron. At that time I think Camp & Thompson were selling their pipe at, I think, five per cent. less off the list—80 off.

Q. After 1893, for the same quality of pipe, what was the market price of it in Chicago?

Q. Well, during 1893 the price was 75 off for city-inspected ring pipe. I am not certain when that price changed, but it gradually was reduced until we were selling at 82 off in 1896.

Q. It was a gradual reduction from time to time from 75 per cent., where it started in 1893, until 82 per cent., in 1896. I wish you would explain to the jury how you got at that and how the price was fixed. Some of the witnesses spoke about card price, and then such a per cent. off.

A. Yes, sir.

Q. Let us know what it is. In the first place, when was this card price established?

A. I could not say, but a good many years ago.

Q. Before your day?

A. Before I was connected with the business. The market price, for instance, for 12-inch pipe, which is a pipe used largely in the

city, was 75 cents per foot. When we were selling that pipe at 80 off, at Akron, the net figures would be 15 cents per foot.

Q. 15?

A. No, sir; 80 off; 75 would leave the net figure 15 cents per foot. At the time the Union commenced to do business in 1893 we were selling at 75 off, which would make the price about 18¾ cents per foot; 12 inch weighs 45 pounds per foot. It costs about five per cent. a car to pay the freight here; so that pipe based at 75 per cent. off at Akron would cost about 70 off here, which would
613 be 22½ cents per foot net for 12-inch pipe on cars at Chicago. This pipe weighed 45 pounds to the foot.

Q. You have said that prior to 1893 these other factories that you have named were in the market in Chicago for the sale of their product. Was there competition prior to that time—prior to 1893—among the various manufacturers who put their product upon the market in Chicago for sale?

A. Yes, sir; there was competition both prior and since 1893.

Q. Was that competition sharp or was it a tame, immaterial competition?

A. It was sharp.

Q. Brought around how?

A. Well, the factories were scattered all around Chicago. It was a desirable market and we had to keep our price on a competitive basis. Although our pipe was perfect, here we recognized the fact that we had to keep our price on a competitive basis in order to hold this market. Other factories had lower rates of freight to this market than we did.

Q. It has been said by several witnesses that the Akron standard pipe or the standard Akron pipe was the pipe that was more generally used in the main sewers of the city. It is said by some witnesses it was the best pipe on the market, and by others that it was not any better than other pipes. I will ask now whether, and under this competition, the manufacturers of the standard Akron pipe had to compete with other pipe, whether inferior or otherwise, in the market and sell at the same rates or prices.

A. Yes, sir; they had.

Q. Was there any change in the conditions—the general conditions—after the organization of the plaintiff company cor-
614 poration and the sale first by the manufacturers to the plaintiff and by the plaintiff to the dealers—was there any change in conditions as to price?

A. No, sir.

Q. More competition?

A. No, sir.

Q. Do you know whether or not the Union Sewer Pipe Company or the dealers in the Akron pipe sold through the Union Sewer Pipe Company were compelled to meet the same competition that the constituent companies had met prior to 1893—prior to the organization of the Union Company?

A. Yes, sir; they had to meet the same competition.

Q. Did the organization of The Union Sewer Pipe Company, the

plaintiff; the purchase of all the pipe manufactured by these several companies in Akron, and the sale of that pipe by the plaintiff in Chicago and elsewhere, at any time from 1893 until the present time, increase the market value or market price of pipe?

A. No, sir; it did not.

Q. Was the price of that pipe of that quality any higher on the market—the market price of pipe of that quality any higher in the Chicago market or other markets after 1893 than it was before?

A. There may have been some sales made at a higher price, but the general——

Q. I mean the market price on the sales of the Union Company. I don't mean the dealers here. Take the general average market price before and after 1893.

A. The general average price was lower, was constantly going down.

615 Q. Were you one of the incorporators of the plaintiff corporation, The Union Sewer Pipe Company.

A. I am not sure of that.

Q. Were you a stockholder in it?

A. Yes, sir.

Q. You were the secretary; were you a director also?

A. Director; yes, sir.

Q. I will ask you to state the purposes of that organization or incorporation.

Mr. McFEE: I object.

Mr. WALKER: I should not have asked that question, if your honor please, if it had not been for the amendment that has been filed here this afternoon with their notices of special defense. In the notices they claim now that the company was organized for the purpose of advancing the prices, stifling competition, forming a monopoly, and doing a variety of other things that the law condemns. That issue now is fairly tendered on your notices.

Mr. McFEE: I withdraw my objection.

The COURT: I understood one of the amendments went to the Ohio common law.

Mr. McFEE: The other amendment, which I submitted to Mr. Walker, he did not object to that going in, and I also had an amendment as to the common law.

Mr. WALKER: I object to the whole thing.

Mr. McFEE: I had it go in and I submitted it to him.

The COURT: My purpose was simply to allow you to amend as to the common law.

Mr. McFEE: I filed an additional amendment. I have filed an elaborate amendment. I would like to save my exceptions if your honor does not wish it in.

The COURT: It was not submitted to me.

Mr. WALKER: It is not only a statement of facts, but a statement of argument upon the facts.

616 The COURT: Your amendment will be limited to the matter I mentioned, which is giving you leave to amend so as to set up the state of which you claim the benefit of the common law.

Mr. McFEE: Then we save an exception on that ruling.

The COURT: That is on your objection, Mr. Walker; you objected to the admission of this new matter?

Mr. WALKER: Oh, yes; I objected to the whole thing. I think your honor is entirely right. I objected to the amendment, and I certainly do not think the amendment follows the direction of the court at all. I certainly do not remember, if your honor please, what the ruling of the court was upon this very question.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

(Q.) (Question read.)

A. One purpose was to——

Mr. COGHLAN:

Q. State all the purposes, if you state any.

The COURT:

Q. In addition to those set out in your articles. There is no use reciting what are in the articles of incorporation; they are in evidence now, aren't they?

Mr. COGHLAN: They are in his deposition, but he is now here in persons. We have got to examine him on those.

The COURT: I thought that was all in.

The WITNESS: One great advantage of going together——

Mr. WALKER:

Q. You may state whether or not the object and purpose
617 of the incorporation was to reduce the supply of manufactured standard Akron pipes.

Objected to by the defendant as leading. Objection sustained.

Mr. WALKER:

Q. You may state whether or not the supply was diminished by reason of the action or through the agency of the plaintiff in the control of the purchase and sale of the pipe.

Mr. McFEE: I object as leading and suggestive.

Which objection was overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

The WITNESS:

A. It was not.

Mr. WALKER:

Q. I think I have already asked you about the market price. You may state whether or not, after the organization of the company and the making of these several contracts between the plaintiff and the several corporations and companies, you had any conversation with these defendants, Dee and Connelly, or either of them, relative

to the effect of that combination, as it was called, or the contracts entered into upon their business in the city of Chicago.

A. I remember a conversation I had with Mr. Dee.

Q. What was the substance or where was that conversation?

A. That was in the fall of 1896—in his office.

Q. At Chicago?

A. Yes, sir.

Q. What was the subject-matter of the conversation?

A. We were discussing the fact that the Union Company was no longer selling pipe. Mr. Dee expressed his regrets——

Mr. McFEE: I object.

The COURT: Use his language.

618–620 A. He said he was sorry the Union Company quit doing business.

Mr. WALKER:

Q. Did he say anything about the effect upon his business that the method of business of the plaintiff company had during the time—during after 1893 and down until 1896?

A. I cannot recall any special thing said on that subject.

Q. Did you meet Mr. Dee often?

A. Not very often; no, sir.

Q. As secretary of the company did you keep up the correspondence of the company?

A. No, sir.

Q. Who was that party?

A. Mr. Rockwell.

621 Redirect examination by Mr. WALKER:

—. Mr. Robinson, about what per cent. of the product after 1893 was marketed—I mean of the Akron sewer pipe was marketed—in the city of Chicago, if you know?

A. I do not know; could not say.

Q. Do you know whether it was all or substantially all sold here in Chicago—the entire product?

A. The entire product of the Union Sewer Pipe Company?

Q. What I want is this: What per cent. of the product of your mills at Akron that was selling to the Union Company was afterwards sold by the Union Company in the Chicago market?

A. I think about twenty per cent.

Q. The rest found other markets around the country?

A. Yes, sir.

Recross-examination by Mr. McFEE:

Q. You are somewhat familiar with where sewer pipe throughout this country is manufactured, aren't you?

A. Yes, sir.

Q. The factories that manufacture them, the extent of those factories, the market in which they place their product?

A. I am familiar with some of them; yes.

Q. You are familiar, as an expert with that, generally, aren't you? Now, I wish you would tell me in what parts of this country that kind of clay which is known as shale is found.

A. I think I have named the factories making shale pipe. Beginning on the East, I say at Rochester, New York, there are two factories making shale pipe.

622 Q. I did not ask you as to the factories, unless you mean me to understand that the shale is found wherever there is a factory.

A. O, sometimes it is shipped in down there; sometimes it is found there.

Q. Without enumerating all those factories again, can you tell me where beds of shale are found in this country?

A. I think so. Some of them I can tell you.

Q. Well, I wish you would tell me.

A. Monmouth, Illinois; Brazil, Mecca; Jackson, Michigan; Columbus, —; Sharon, Pennsylvania; Rochester, New York, and I think there are others that I do not have in mind just now. I might search my memory and give you a number of others.

Q. Do you mean this jury to understand that from the factories at Brazil, and Streator, and Monmouth, and Jackson, Michigan, and Macomb, Illinois, that there was manufactured a shale inspection-proof city main sewer standard pipe of the same grade and quality equal to the Akron standard inspection-proof pipe up to 1895?

A. No, sir.

Q. O, no?

A. I don't want you to understand that.

Q. Oh, you don't mean that at all. So that was after, wasn't it?

A. How is that?

Q. It was subsequent to 1895 that all that happened?

A. The COURT: You asked him where there were beds of shale, and he has told you.

Mr. MCFEE: Well, I am not asking about shale now.

The COURT: You did ask him.

Mr. MCFEE: I know, but I am satisfied as to the shale I got
623 my information. I am now asking him about this pipe that he put on the market that he testified about.

Mr. WALKER: And they are including your city of Chicago inspection, which your witness says has to be bought.

The WITNESS: There are one or two factories in that list of names——

Mr. MCFEE (referring to Mr. Walker's last remark): He didn't say any such thing. There is no use slandering the city inspectors.

The WITNESS: I did not say that.

The COURT: Answer the question.

The WITNESS: Not all those factories made city pipe, I don't think.

Mr. McFEE:

Q. Don't you know that up to 1895 that the Akron manufacturers and the Union Sewer Pipe Company during its existence was practically without a competitor in main sewer pipe in the city of Chicago?

A. No, sir; I don't know anything of the kind; anything better than that.

Q. You mean you know better by knowing that city pipe was put in?

A. Yes, sir.

Q. Can you name a single street in which pipe was put in the city of Chicago during 1893 other than the Akron pipe?

A. No, sir; I am not familiar with the streets that the pipe was laid in.

Q. Well, where? You pretend to be very familiar with the Chicago market. How do you know that other pipe was put in?

A. Shipped here and sold here and bought here by contractors.

Q. But do you know it was used for municipal contracts?

A. Yes, sir; I think so.

624 Q. But do you know it? Can you state on your oath that that is so?

A. No, sir; I cannot state on my oath that that is a fact.

Q. You don't know, then, that the other pipe that was sold in the city of Chicago was used in municipal contracts or not from 1893 to 1895?

A. Not from personal knowledge; no, sir. I could not swear to that.

Q. Now, you have used a phrase like this: "The substantial capacity of those various factories." I don't understand that term. Mr. Walker says I ought to. I wish you would define what that means. What do you mean by "substantial capacity" of a factory?

The COURT: He went on and gave the actual capacity afterwards.

Mr. McFEE: I didn't hear it. I was trying to hear it.

The COURT: So many car-loads per year in Columbus.

Mr. COGHLAN: He said about twenty per cent., I believe, of the product of the Union Sewer Pipe Company came to Chicago, didn't you?

The WITNESS: You are getting mixed on my testimony.

Mr. McFEE:

Q. Tell me what you mean by "substantial capacity"?

A. The factories are usually run on their kiln capacity in the sewer-pipe business. I don't know any factory that does not make at least one kiln of pipe a day. They make from that up to three or four kilns a day, and one kiln may hold one car-load of pipe. It depends largely on the size of the kiln. The kilns vary in size.

625 Q. You testified and Mr. Walker has asked you, and also Mr. Connelly, about shale pipe that was placed on the Chicago market. Did you mean us to understand by your answers to those questions about various shale pipes that were placed on the Chicago market? Did you mean the jury to understand that they were all placed here for the municipal contracts in main sewers and in competition for those municipal contracts with Akron standard pipe in this city?

A. I mean to say that there was other pipe than Akron pipe sold here for municipal contracts.

Q. What contracts were they sold for?

A. I don't know any special contract.

Q. Can you name any one?

A. I am very certain that the Columbus Sewer Pipe Company sold pipe here for years. They maintained an office in the Chamber of Commerce building. They maintained a stock of pipe in this city and they carried twelve and fifteen inch sizes in stock, and those sizes were used by the city of Chicago, and no one else used them here.

Q. Do you know that the city of Chicago used them or were they used in the suburbs and in other cities of Illinois?

A. The pipes were all laid under the inspection of the city of Chicago.

Q. How do you know that?

A. This was true as to pipe specified by the city of Chicago. That is specified by the charter—what was known as ring pipe. It was to be all in three-foot lengths and no socket. There was only one other city in the United States that specified that kind of pipe, and the Akron people have covered all this trade and also the Columbus Sewer Pipe Company. They carry this stock in trade at Co-

626 lumbus and also in this city for years.

Q. But don't you know it was used at Cicero and at La Grange and all of these towns around here, and not used out of the confines of this city, Blue Island and various other towns, and Evanston and Highland?

A. I am not sure whether they used the ring pipe.

Q. You heard Mr. Kent testify here this morning?

A. I heard some of his testimony.

Q. Do you mean the jury to understand that what he said was not true about this pipe being used exclusively in the city of Chicago prior to 1893?

Objected to by the plaintiff. Objection sustained; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. McFEE:

Q. You state that Camp and Thompson, the only concern that was not incorporated that went into the Union Sewer Pipe Company, did not make quite as good pipe as the corporations that went in, didn't you? They were a little bit worse than the other pipes?

A. Their pipe was not regarded quite as good as the Union sewer pipe.

Q. The Union sewer pipe sold it after they got into the business?

A. I think so.

Q. It was a substitute, and was so used by the other manufacturers?

A. It may have been used as a substitute.

Q. Don't you know, Mr. Robinson, that that is a fact?

A. That their pipe is used?

627 Q. Yes; that their pipe brought the same price here in the city of Chicago or was shipped here at the same rate.

A. I know that many times it was not shipped at the same rate. It was sold under the market value of Akron pipe.

Q. You know that you charged Dee and Connelly seventy-five per cent. on that very grade of pipe from that factory; didn't you?

A. We may have done so.

Q. You said that after this Union Sewer Pipe Company came together there was a great increase in sales of products; that is true, isn't it?

A. We increased our factories; a number of us at Akron; yes, sir.

Q. And particularly in the Chicago trade?

A. I did not say that we increased our trade here in Chicago.

Q. Don't you know that all of that boom was on account of the World's fair and the enormous amount of drainage pipe that was used down here along about 1893?

A. I don't know that.

Q. Didn't William E. Dee buy more pipe from that company in 1893 than any other single customer that the company had anywhere throughout the world?

A. I don't know that he did.

Q. You don't know that part. You don't say that he did not?

Q. I would not want to testify that he did or that he did not.

Q. Don't you know that William E. Dee was buying this enormous quantity, exceeding any other customer that you had, because of the World's fair?

A. I don't know that.

Q. Don't you know that he bought 1,100 car-loads on ac-

628 count of the World's Fair contracts alone?

A. I don't know that at all.

Q. You said that the prices went down, until in 1896 they went down to 82½ per cent.—that is, they decreased 7½ per cent.—didn't you?

A. I think to 82, I said—82 on.

Q. That decrease in price was about the time they got in the Red Wing and other pipe after Kent, the city inspector, made this test?

A. No, sir; I don't know what it was.

Q. Don't you know that just as soon as Kent made this test and the bars were thrown down and other pipe came here that you people immediately decreased your prices until you went to 82 per cent.?

A. We always kept our prices on a competitive basis.

Q. What was the cause of this decrease to 82½ per cent.?

A. Natural causes.

Q. Wasn't that one of the natural causes?

A. Oh, I think it had some bearing upon it.

Q. You say the combination didn't have anything to do with increasing prices, didn't you, Mr. Robinson—the combination of this Union Sewer Pipe Company had nothing to do with increasing prices; didn't you say that?

A. How is that? Say that again.

Q. I understood you to say in your examination-in-chief that the organization of the Union Sewer Pipe Company and its purchase of the entire product of the constituent companies had nothing to do with increasing prices.

629 Mr. WALKER: He said that prices were not increased after the organization.

Mr. MCFEE: He said more than that, that it did not cause an increase in price.

Q. Did you say that?

A. I think that is what I said.

Q. That it did not cause an increase in the price?

A. I wish to say right here that the Union Sewer Pipe Company may have charged more in some instances. For instance, we were bidding on contracts all over the country. On city municipal contracts we may have charged some city a higher price than they had paid previously, or we may have charged them a lower price, dependent on the conditions of the time and competition, etc.

Q. Of course, you charge prices lower where others like Kent had thrown down the bars to all these companies where you had competition?

A. Yes, sir.

Q. Here you had no competition?

A. I beg your pardon; we always had competition here in Chicago.

Q. Well, none other than you have testified to?

A. No, sir.

Q. How did it happen, then, that if this combination did not result in the increase of prices that no sooner was the combination formed than Dee's prices and Connelly's prices were pushed up five per cent. of the whole list price, or $30 per car?

A. They paid seventy-five per cent. off for ring pipe in 1892.

Q. I want to know how their price went from 80 off to 75.

630 Q. They were buying of Camp and Thompson previous to the formation of the Union, and they bought their pipe a little lower than market price of Akron pipe before the Union was formed. They paid 75 per cent. off in 1892 before the Union was formed.

Q. I did not ask you that. I ask you how it happened that after the Union was formed their prices were increased from 80 to 75. You know they were increased. Why were they increased?

A. I do not know.

Q. Mr. Robinson, were each of these ten companies designated and known as numbers instead of by their names on the books or in the affairs of the Union Sewer Pipe Company?

A. They may have been.

Q. Don't you know they were called No. 1, 2, 3, etc.?

A. For what purpose?

Q. Well, that is what I want to know; but don't you know that that was a fact?

A. I recollect that some of our books — with reference to pipe furnished by numbers for convenience.

Q. I did not ask for what purpose. You know, as a fact, that the Buckeye was known by number, wasn't it?

A. Not generally known. The book-keeper may have put some number on it.

Q. What was the number of Camp & Thompson's plant?

A. I don't know.

Q. Don't you know it was No. 3?

A. No, sir. I do not know it.

631 Further cross-examination.

By Mr. COGHLAN:

Q. Mr. Robinson, you just stated to Mr. Walker and also to Mr. McFee that after the organization of the Union Sewer Pipe Company there was competition in the Chicago market on the product known as standard Akron pipe?

A. Did I say that?

Q. Yes.

A. Standard Akron pipe?

Q. Yes.

A. Well, I misunderstood the question, then.

Q. Oh, I see——

A. There was competition for what is known as standard pipe.

Q. Well, then, do you mean to include standard Akron pipe?

A. No, sir; I do not.

Q. Then you don't mean to say that there was competition on the Chicago market for the product of your Akron mills?

A. There was competition among the local men here; yes, sir; but not from a manufacturing standpoint.

Q. What?

A. Not from a manufacturing standpoint, but the local dealers were competing with each other.

Q. Yes; but I am referring to competition with your Union Sewer Pipe Company by any outside manufacturers on the product known as standard Akron pipe.

A. Not on Akron pipe; no, sir.

Q. Therefore you had the Chicago market on standard Akron pipe all to yourselves?

A. Yes, sir.

Q. From the time of the formation of the Union Sewer Pipe Company up to the time of its dissolution?

632 A. We did not have all the markets to ourselves.

Q. That is, you had no competitors in that peculiar product on the Chicago market?

A. We marketed all the pipe that was known as Akron pipe in this market.

Q. You had nobody else outside of your organization manufacturing Akron pipe?

A. No, sir.

Q. Now, Mr. Robinson, you were secretary of the Union Sewer Pipe Company?

A. Yes, sir.

Q. You were a stockholder in that concern?

A. Yes, sir.

Q. How many shares of stock did you hold?

A. Four shares.

Q. You may tell us what was the capitalization of the Union Sewer Pipe Company.

A. The authorized capital was $20,000.

Q. How many shares was it divided into?

A. 200 shares.

Q. Tell me who were the stockholders that held those shares.

A. Isn't that in my deposition? Do you want me to go over that again?

Q. But we did not read your deposition, Mr. Robinson.

A. I don't know that I can recollect that. Let us see; there were seven who had four shares each, I think.

Q. 28 shares; is that right?

A. I think that is correct.

Q. $2,800 paid in?

A. No, sir; $2,800 subscribed and $280 paid in.

Q. And the authorized capital was $20,000?

A. Yes, sir; I don't recollect the names of the stockholders, but I think I might——

633 Q. Have you any of the minute books of the corporation here?

A. No, sir.

Q. What became of the minute books of the corporation?

A. The minute book was in my desk at the time our office was destroyed by fire, and the minute book was burned up. That happened a little over a year ago; that happened in 1897.

Q. I will ask you, Mr. Robinson, by way of refreshing your recollection, if those were not the stockholders (reading):

D. E. Hill, four shares; George R. Hill, four shares; William MacFarlane, four shares; J. A. Baldwin, four shares; H. D. Camp, four shares; B. W. Robinson, four shares, and O. C. Barber, four shares.

A. That is correct.

Q. Those were the original stockholders of the Union Sewer Pipe Company?

A. Yes, sir.
Q. Were any transfers made of that stock?
A. Yes, sir.
Q. What transfers were made, if any?
A. Mr. Camp transferred some of his stock to Mr. Thompson, I believe. Mr. MacFarlane transferred some of his stock to Mr. Baird. I think Mr. Hill transferred some of his stock to Mr. Champan.
Q. All those gentlemen that you mentioned were stockholders or officers in the constituent members of the Union Sewer Pipe Company?
A. Yes, sir.
Q. Or the constituent companies, I should say, of the Union Sewer Pipe Company?
A. All of them?
Q. Yes.
A. I am not certain, but I think they were.
Q. There were no outsiders in it at all?
A. What do you mean by "outsiders"?

634 Q. No outsiders outside of those original constituent companies of the Union Sewer Pipe Company. Do you understand my question?

A. I don't quite understand.
Q. That is, I say, Mr. Robinson, that there was nobody in the Union Sewer Pipe Company except men who were connected with the constituent companies of the Union Sewer Pipe Company?
A. No, sir; there were not, I believe.

635–639 Redirect examination.

By Mr. WALKER:

Q. On the cross-examination of the last counsel you said that prior to 1893 and subsequent to that date until 1895 you were the sole parties in the field of Chicago selling Akron standard pipe or standard Akron pipe. I will ask you if there was not during that same time other manufacturers offering their product for sale upon the market of the same size and to be used for the same purpose.

Mr. COGHLAN: Objected to. He has already brought that out on his direct examination, and my cross-examination was restricted to standard Akron pipe.
The COURT: Yes.

640 A. I know the price that was obtained by the companies that I was connected with.
Q. In 1892?
A. Yes, sir.
Q. Have you a knowledge of the market price of the products of those factories after the organization of the Union Company and the sale of those products by the Union Company?
A. I have, more or less.

Q. You may state whether there was an increase or a lessening of market price of that product after 1893.

Mr. COGHLAN: Objected to as leading.

Which objection was overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

The WITNESS:

A. There was no change in price, I think, during the year 1893.

Mr. WALKER:

Q. During the year 1894 how did the price compare with the market price of 1893?

A. There was a gradual decline in prices—a slight decline—but whether that applied to the Chicago market I am unable to say just now. I have not made any reference to the books.

Q. Do you know where this pipe that was sold by the Union Company in 1893 to Dee and Connelly—where it was delivered to them, and how?

A. On board the cars at the factories.

Q. On board the cars at the factory—f. o. b., as it is termed?

A. Yes, sir.

Q. Did you have anything to do with the bills of lading?

A. No, sir.

641 Q. What has been your business, you say, while you were with the Union Company?

A. I had charge of the correspondence. I did most of the correspondence.

Q. Did you make out the bills?

A. No, sir.

Q. Did you enclose the bills?

A. No, sir.

Q. Did you have anything to do with the correspondence with Dee over his account?

A. Yes, sir.

Q. Do you know what that account was?

A. What the account was?

Q. Yes.

A. I don't remember now.

Q. Will you look on that copy of the letter (indicating) and see if that will refresh your recollection. The amount in the bill is admitted here. What I want to ask you or what I want to prove is simply when that amount became due.

Mr. COGHLAN: You cannot prove it now.

Mr. WALKER: I cannot prove it now? Why can't I?

Mr. COGHLAN: You have closed your direct case. You are bringing out new matter now.

Mr. McFEE: Yes; and one point that I wish to reserve is that they have not proved any amount for Dee at all. I object, now, that on their re-examination, after we have put in our proof, that you should prove the amount due by Dee. They must prove the

amount due in chief. We have admitted the delivery of certain car-loads, but they have not proven that a dollar is due by Dee.

The COURT: I understand that the amounts were admitted.

642 Mr. McFEE: That the amounts were admitted?

The COURT: If not, they may be shown now.

Mr. McFEE: I said I admitted the delivery of those cars, but I expressly denied the amount.

The COURT: Go ahead.

Mr. WALKER: You admitted the account sued on?

Mr. McFEE: I did not. I admitted the delivery of the cars.

The COURT: Certainly; if they were misled into thinking so they can do so now.

Mr. McFEE: Why, the very thing we are contesting is the amount due.

The COURT: No, sir; the balance on that account. What you are contesting is whether they can collect it or not.

Mr. McFEE: And the amount due. As part of our specific case, we deny that anything is due.

Mr. WALKER:

Q. Will you look at that copy of the account that was filed with the original declaration? State when that balance became due. (Shows paper to witness.)

Mr. McFEE: I object to the proof of that at this time. I object also to the form of the question.

The COURT: I think, perhaps, the form of the question is objectionable, Mr. Walker.

Mr. WALKER:

Q. When it became due.

Mr. McFEE: That is, assuming it ever was due.

Mr. WALKER: I don't clearly understand what the counsel is objecting to. I don't mean to say that he is admitting that we are entitled to recover that amount at all. The account as filed is admitted, as I understand.

643 Mr. McFEE: No, sir; it is not admitted at all.

Mr. WALKER:

Q. Under the contract made with Dee, can you state when the goods were to be paid for that were delivered each month?

Mr. McFEE: I object to that. That is his conclusion as to a contract.

The COURT: Overruled. It is as to what the agreement was.

To which ruling of the court counsel for the defendant then and there duly excepted.

Mr. McFEE: I object to the form of the question.

The COURT: Can you answer?

A. Yes, sir.

Q. Well, answer.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

The WITNESS:

A. It was due ninety days from July 10th.

Mr. WALKER:

Q. Ninety days from July the 10th?
A. Yes, sir; of the year.
The COURT: What year?
A. 1896.

644 Cross-examination.

By Mr. McFEE:

Q. How do you know that?
A. Because those were the terms under which he bought the goods.
Q. How do you know? Were you there when he bought the goods?
A. Yes, sir.
Q. Did he buy them from you?
A. He bought them from the Union Sewer Pipe Company, and I was employed to look after that part.
Q. Who was present? Who negotiated the contract of sale with him?
A. I don't know that it was negotiated with anybody particularly. Most of his orders came in by mail.
Q. Were you there at the time he made this contract and agreed to pay in ninety days, wherever it was made?
A. No, sir; it was made in Chicago.
Q. You were not in Chicago at all then?
A. O no.
Q. What do you know about it?
A. I know according to the contract under which we did business.
Q. Was it a written contract?
A. Yes, sir; I have seen a copy of it.
Q. You know that Dee did a whole lot of protesting about paying anything?
A. I know he was always kicking about dockages, etc.
Q. You know he was kicking because you were charging five per cent. on the list price in excess of what he agreed to pay?
A. I don't remember that.

645 Mr. WALKER: I object to the question.

Mr. McFEE:

Q. You say that the result of this combination there, known as the Union Sewer Pipe Company, was to decrease prices, didn't you?
A. No, sir; I didn't say that.
Q. Was the result to decrease or increase?

A. I did not say that.

Q. What was the result, I ask you now?

A. I said the prices were lowered.

Q. Was that in consequence of this combination?

A. I don't know what caused it.

Q. If prices were lowered, why did they push up the prices five per cent. to Dee and Connelly?

A. They did not.

Q. Don't you know that there was eighty per cent. to be paid by Dee and Connelly for shipments from Camp and Thompson's factory, and that the Union insisted upon charging 75 per cent. off of the list price?

A. I do not know that they were to have five per cent. from Camp & Thompson or Dee was to be charged 80 per cent.

Q. Don't you know that that was changed; that that had been in effect for years between Dee and Connelly and the Union Sewer Pipe Company?

A. I do not know; no, sir. I don't know that.

646 WILLIAM A. HUMPHREYS, a witness called in rebuttal on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Walker, and testified as follows:

Q. Mr. Humphreys, what is your business?

A. I am at the present time the manager of the Western office of the Robinson Brothers and Company.

Q. What business are they engaged in at this time, manufacturing?

A. Manufacturing firebrick, sewer pipe, sewer linings, etc.

Q. One of the Akron concerns?

A. Yes, sir.

Q. How long have you been with that company?

A. Sixteen months.

Q. Prior to that time what was your business?

A. I presume—well, as solicitor part of the time, and as solicitor and salesman, and part of the time as manager for the Columbus Sewer Pipe Company of Columbus, Ohio.

Q. How long were you connected with the company in that capacity?

A. From the first of January, 1893, to the first of October, 1899.

Q. The Columbus Company was engaged in what kind of business?

A. Manufacture of sewer pipe.

Q. Of the different grades, different sizes of sewer pipe?

A. All the sizes; yes, sir.

Q. You have heard something said, if you have been in the court-room, of what was known as the standard Akron sewer pipe. You may state how that pipe differs in quality, if it differs at all,

647 from the pipe of the same size manufactured by the Columbus Company during those years.

A. There is no difference in it, to my knowledge. It is the same clay—shale clay.

Q. And on the market was there a difference in price?

A. No, sir; no more than actual competition made in going after the contract.

Q. Did you have an office in Chicago during these years from '93 to '99?

A. A main office; two yards about three years, and one yard the balance of the time.

Q. About what was the capacity of this Columbus Company?

A. I cannot state that. I know what was the amount of business we did here, but I cannot tell how much they did East.

Q. Prior, you say, you went into that company in 1893?

A. Yes, sir.

Q. Prior to that time what were you doing?

A. I sold dry goods out of St. Louis.

Q. Do you know whether the Columbus Company had an agency in Chicago prior to 1893 for the sale of its product?

A. They did, sir.

Q. Who was the agent and in charge of its product?

A. Rhodes and Ramsey Company.

Q. I will call your attention now particularly to the pipe used in the construction of the main sewers in the city during 1893 and from that period on until the present time, and ask you whether during that time the Columbus pipe was used in the city by contractors in the construction of sewer pipe.

A. The Columbus pipe has been used in the construction of main sewers in the city of Chicago by contractors during all that time up to the time that I left them and under my administration.

648 Q. Can you state to what extent and quantity it was used?

A. About one-third of the sales in this city.

Q. About one-third of the sales? What was the aggregate amount of sales?

A. An average of about 75 cars per year, probably—that pipe that was required for main sewers.

Mr. McFEE:

Q. How many cars?

A. About seventy-five cars per year. I can give you the names and the contracts if you want them.

Mr. WALKER:

Q. About how much sewer would that lay—that seventy-five cars—on an average?

A. Well, I never figured that out. It depends. There is about 600 feet of 12-inch pipe in a car, I believe—possibly 700 feet. There was about 450 feet of 15-inch pipe in the car.

Q. At all events, that was about the average amount they sold during each year during the time you have named?

A. Up to the year 1896.

Q. And that was only about a third of the entire sales of the Columbus pipe?

A. Yes, sir.

Q. What was the other two-thirds used for?

A. It was *sold* in laying what we call subwork, house connections and putting in sewers from the center of the sewer to the house. That was under and it is all under city inspection, but it is a smaller sized pipe.

Q. During these years was there any competition in Chicago in the marketing of sewer pipe for main sewers?

A. Decidedly.

Q. What companies were in the market and competing with each other for the sale of such pipe?

649 A. My experience brought me in contract with the local dealers more than with the manufacturers.

Q. To whom did you sell, principally, your pipe?

A. We sold directly to contractors.

Q. To contractors?

A. Or to the city itself.

Q. And this pipe that you sold them; did you know where it was used?

A. Yes, sir; I have been on every piece of work that I guess that we ever sold a piece of pipe on and for main sewers.

Q. Were you present at any time while the inspectors—city inspectors—were there?

A. Yes, sir.

Q. You may state whether at any time there was objection made to that pipe because it was not standard Akron pipe.

A. The specifications of Chicago have never called for standard Akron sewer pipe, in my knowledge. I know they did not in 1892, 1893, and '4, and '5, and '6.

Q. What I ask is, did these inspectors, notwithstanding the specifications, make any objections to the laying of the Columbus pipe?

A. We have had rejections. The Columbus pipe had rejections the same as Akron.

Q. Did they object to it because it was not standard Akron pipe?

A. No, sir; they would reject a piece of pipe and we would haul it away and replace it with another piece of our own pipe.

Q. They would reject the defective pipe?

A. Just exactly the same as they did with any other.

Mr. McFEE: We object. That is twice he has said that. It is a conclusion and it is improper.

The COURT: He said the same as any other.

650 Mr. McFEE: I move that that be stricken out as utterly improper.

Which motion was overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. WALKER:

Q. Were you acquainted with the superintendent of sewers during the time that you speak of—the different superintendents?

A. I have known them all, I think, in a business way.

Q. Were you acquainted with A. W. Cook, superintendent of sewers, in 1894?

A. Yes, sir.

Q. Are you acquainted with his handwriting?

A. Why, if you put it in amongst a lot of other handwriting I do not believe that I could identify it.

Q. Will you look at the letter now shown you (indicating) and state, if you know, in whose handwriting that certain letter is?

A. A. W. Cook's.

Mr. McFEE: I object, if the court please. It is not responsive. He should ask him if he knows.

The WITNESS: I know positively that that is A. W. Cook's. I saw the man sign his name to it, and the letter has been in my possession since he signed his name to it; consequently I know.

Mr. WALKER: I offer it in evidence.

Mr. McFEE: I object to this. It is addressed to nobody. This does not purport to be addressed to anybody, if the court please. It is not binding upon us. It is a statement of a fact which ought to be proven under oath if it is to be proven at all. I don't
651 know of any rule of evidence by which a certificate of good conduct or of good quality given by a municipal officer is admissible in evidence to show the truth of what it contains. It is binding upon nobody.

Mr. WALKER: We offer it for this reason. Some of the witnesses called by the defendant swear that these officers would not permit the use of any pipe except the standard Akron pipe in the construction of the main sewers, and I bring these certificates from these very officers certifying to the virtue and value of this Columbus pipe and endorsing it.

Mr. McFEE: Why don't you bring the officers, Mr. Walker?

Mr. WALKER: It is not necessary for that purpose.

Mr. McFEE: It is a statement not under oath and not subject to cross-examination, and there is no rule by which it is admissible.

The COURT: I don't think strictly it is competent. Of course, if you are showing a course of business and all that, it might come in possibly.

Mr. WALKER: The court rules it out, then?

The COURT: Yes.

Exception by plaintiff.

Mr. WALKER:

Q. I hand you, Mr. Witness, a letter purporting to be signed by G. L. Clausen, superintendent of bureau of sewers.

Mr. McFEE: Same objection.

Mr. WALKER:

Q. Will you state whose signature there is to that letter?

A. G. L. Clausen.

Q. Did you see him write it?

A. I did.

652 Mr. WALKER: We offer it in evidence. It is to the same purport as the other, your honor.

Objected to by the defendant. Objection sustained. Exception by plaintiff.

Mr. WALKER:

Q. I hand you a letter now signed by D. E. Davidson, under date of November 22nd, 1897, and ask you if you know whose signature that is?

A. It is F. E. Davidson. I saw him sign that.

Mr. WALKER: I offer it in evidence.

Objected to by counsel for the defendant. Objection sustained. (Exception by plaintiff.)

Mr. WALKER: I now hand you a letter under date of June 24th, 1889, addressed to the Columbus Sewer Pipe Company, Columbus, Ohio, purporting to be signed by C. H. Cheney, superintendent of sewers, and ask you if you know whose signature there is to that letter.

A. I did not see Mr. Cheney sign that letter.

Q. Do you know his handwriting?

A. No, sir; not to identify it.

Mr. WALKER: Then we do not offer it.

Q. Did I ask the witness whether you were familiar with the market price of sewer pipe—the larger size for the main sewers in the city—during the year 1892?

A. I don't know that I could recall the exact price.

Q. Can you state whether the price from 1893 and on to 1896 was more or less than the market price for that pipe was in 1892?

A. Less. It constantly fell; yes, sir.

653 Cross-examination.

By Mr. McFEE:

Q. Mr. Humphreys, when did you stop selling dry goods in St. Louis?

A. I stopped selling dry goods in St. Louis in 1890.

Q. When did you start into the sewer-pipe business in Chicago?

A. In 1893, the first of January.

Q. Did you ever see a specification for sewer work issued by the city of Chicago—issued before 1890?

A. Before 1890?

Q. Yes.

A. Well, I cannot answer that directly, for this reason: That I have seen specifications from the city of Chicago that dated back much longer, some time before the time I went into the sewer-pipe business.

Q. And you say positively that prior to 1892 that there was no specification of Akron pipe or its equivalent or its equal in those specifications?

A. I say I have never seen one. Within my knowledge those were the words that were used.

Q. Then, within your knowledge, you don't mean to have it understood that you had any knowledge on the subject?

A. I had knowledge on the specifications of 1892 and 1893 up.

Q. Well, you have not any knowledge before that time?

A. No, sir.

Q. Robinson Brothers and Company, that you are not associated with, is the firm of which Mr. Byron W. Robinson, who was on the stand, is the head? That is true?

A. Yes, sir.

654 Q. How large is the plant of this Columbus pipe factory?

A. Well, I am not as familiar with——

Q. Well, I mean what is its product?

A. Its product is sewer pipe.

Q. I know; but I mean in proportion to the extent of its product. How much does it turn out each day, each week, each year?

A. I cannot tell you that much. I have said I don't know anything about the sales in the East. I can tell you what we have sold here, if you want to know.

Q. You say you have sold seventy-five cars on an average each year?

A. For those few years.

Q. And you say that seventy-five cars constitute about one-third of all the sewer pipe used in the city of Chicago during those years?

A. No, sir; I did not say that.

Q. What did you say?

A. I said that that seventy-five cars constituted one-third of the business of the Columbus Sewer Pipe Company out in Chicago.

Q. Well, how much in proportion to the pipe that was furnished by the Columbus Sewer Pipe Company to the entire sewer pipe used in main sewers in Chicago?

A. I have no method of knowing how much pipe Mr. Williams or Mr. Dee or Mr. Connelly or any one else sold. I can give you facts as to our sales, but not as to theirs.

Q. Have you any idea as to the proportion?

A. I have not the least.

Q. Do you know whether it was one per cent.?

A. I could not tell you anything about it, because I don't

655 know what they sold. I have not the least idea as to the extent of their sales.

T. M. Humphreys, called as a witness in rebuttal on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. Walker, and testified as follows:

Q. State your name.

A. T. M. Humphreys.

Q. Mr. Humphreys, where do you reside?

A. In Chicago.

Q. How long have you been a resident of Chicago?
A. Since early in 1892.
Q. Are you engaged in any business at the present time?
A. I am.
Q. What is that business?
A. I am book-keeper for the General Chemical Company.
Q. What business were you engaged in in 1892?
A. I was book-keeper for the Rhodes & Ramsey Company.
Q. What business were they engaged in?
A. They were in the sewer-pipe and coal business.
Q. Are they in the same business now?
A. No, sir.
Q. What is their business now?
A. They went out of business on the first of March, I think, 1894.
Q. You are a book-keeper for what company at present?
A. The General Chemical Company.
Q. In 1892 did that firm handle sewer pipe?
A. They did.
Q. What pipe, what brand, and what make?
A. They handled Akron pipe and they handled Columbus pipe.
Q. Did they have a yard where this pipe was stored?
A. Yes, sir.
Q. And in that yard both kinds of pipe were stored?
A. Yes, sir.
656 Q. Different sizes or but one size?
A. All the sizes used in the city.
Q. What, if anything, do you know about the use of the Columbus pipe in the construction of the main sewers in the city of Chicago and during the year 1892?
A. Nothing.
Q. What do you know about the handling of that pipe by that firm during that year?
A. I know that they handled in 1892 Columbus pipe and Akron pipe, but I don't know where it was buried in that year.
Q. Do you know about the sales of the pipe?
A. Not during that year; no, sir.
Q. Do you know anything about the use of the pipe in the construction of the main sewers in the years after 1892?
A. Yes, sir.
Q. What years?
A. In 1894, '5, '6, and a part of '7.
Q. You have no knowledge of the business during the year 1893?
A. No, sir; I was with the Columbus—I mean the Rhodes & Ramsey Company at that time, and my business was mostly in the coal business—that is, the coal department I had charge of—and consequently I knew very little about the sewer pipe.
Q. Well, in 1894, what was your business?
A. After the Rhodes & Ramsey Company went out of business I took the management and charge of the Columbus Sewer Pipe Company's business.

Q. And you kept that for how long a time?
A. From the first of March, 1894, until the first of July, 1897.
Q. The last witness that was on the stand, is he a relative of yours? He has the same name.
657 A. I guess so; he is said to be a son of mine.
Q. Was he with you during those years?
A. He was.
Q. Have you a personal knowledge of the use of the Columbus pipe in the construction of the main sewers of Chicago during those years?
A. I think so.
Q. Do you know whether, if used at all, to what extent it was used?
A. It was used to some considerable extent. I don't know exactly how much was used. I think about one-third of our sales was 12 and 15 inch pipe used by the city.
Q. Were you at any time on the work on the ground where this pipe was being laid or planted?
A. Very seldom, sir; my duties were in the office constantly.
Q. You were in the office?
A. Yes, sir.
Q. Were you familiar with the specifications, the general specifications, as to pipe that were made by the city during those years?
A. Well, I don't know that I was familiar with them. I have read the specifications.
Q. Do you know whether there was any—so far as you saw—specifications? I refer especially to the specifications regarding the pipe. Were they uniform or were they alike in all contracts?

Mr. McFEE: I object as calling for a conclusion. The "uniform" part I object to.

Which objection was overruled by the court; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. WALKER: Go on.

A. I don't remember any difference in the specifications;
658 I think they were about the same.
Q. Did you at any time see a specification or specifications requiring the use in the construction of the main sewers standard Akron pipe, so described in the specifications?
A. I never did.

Cross-examination by Mr. McFEE:

Q. Do you know Joe Duffy?
A. I do; I have seen him.
Q. Do you know what his business is?
A. Yes, sir.
Q. Do you know what his business was in 1894?
A. Yes, sir.
Q. What was it?

A. He was a contractor.
Q. For what?
A. For sewer work.
Q. Don't you remember that you had a contract for supplying him with a lot of Columbus sewer pipe in 1894?
A. No, sir; never had any such contract.
Q. Never had any contract?
A. No, sir.
Q. On North 59th and Summerdale avenue?
A. Never had any contract with him, sir.
Q. O, emphasis on the "contract." O, wasn't Columbus pipe supplied to Joseph Duffy for the construction of a sewer on North 59th and Summerdale avenue in the year 1894?
A. I think so.
Q. And don't you know that the city rejected that pipe and had it dug up and taken away?
A. I don't know anything of the kind, sir.
Q. You don't know that?
A. No, sir; that is the first I ever heard of it.
Q. Do you know Ryan and Waters?
A. I do not. O, I know Ryan; yes, sir.
659 Q. Don't you know that Ryan had the contract for that sewer before Duffy?
A. Yes, sir.
Q. And don't you know that the city put Ryan out because he did not do his work, and Duffy got the contract afterwards?
A. No, sir; I don't know that.
Q. And didn't you supply the pipe for Ryan & Summers then?
A. No, sir.
Q. Ryan & Waters?
A. No, sir.
Q. Do you know, as a matter of fact, that a- Summerdale and North 59th street that all of that pipe was condemned because it was Columbus pipe and taken away, and Dee supplied Akron pipe in its place?
A. I know it was not, and I know that we supplied Mr. Dee some of that pipe that was taken away up there.
Q. Then you do know about the pipe?
A. I know about the pipe and I have sold some of it. We sold some of it to Mr. Dee.
Q. And don't you know that Mr. Dee took his teams and hauled it away?
A. I expect he did. He said he would do it.
Q. Don't you know that that was because the city condemned it?
A. It was not rejected pipe. That pipe that we sold Mr. Dee was rejected pipe that laid there after the work was consummated and finished.

Mr. WALKER:

Q. How much was rejected?

A. I think Mr. Dee paid us in the neighborhood for about $200 worth.

Q. You may state whether that pipe was rejected because it was stamped standard Akron pipe.

Mr. McFEE:

Q. It was not stamped?

660–663 A. No, sir; it was rejected because it was defective pipe. That it why it was rejected.

Mr. WALKER:

Q. It was not rejected simply because it was Columbus pipe?

A. No, sir; it was rejected because of defects. It was a portion of twenty-six cars that went in there.

(Plaintiff rests in rebuttal.)

Whereupon the defendant introduced the following evidence in surrebuttal.

* * * * * * *

664 W. A. HUMPHREYS, recalled by the plaintiff in rebuttal, testified as follows:

Mr. WALKER:

Q. Have you any personal knowledge of this Duffy contract and the taking up of the Columbus pipe and the rejection of it down in the south parts of the city?

A. It was in the northern section of the city.

Q. What are the facts connected with that?

A. The whole story?

Q. Yes.

A. It is a short one. The contract was first made between Ryan & Waters with the Columbus Sewer Pipe Company for the furnishing of that pipe. We furnished two cars to Ryan & Waters. They failed. Barney F. Weber was the man that was furnishing the brick for the brick sewers. He had to take the contract off their hands. He was on their bond. He entered into contract with the Columbus Sewer Pipe Company for the remainder of that contract and went to work to build the sewers himself. He built some of them. We furnished twenty-one cars of pipe to Barney F. Weber under contract with B. F. Weber. Joe Duffy went in and didn't have quite
665 enough pipe to finish the deal; came to our office and bought five more cars; never claimed a piece of rejection in his life from those five cars, and paid us every cent in full for it—every cent. Mr. Dee did buy some pipe.

Mr. McFEE: That's enough.

666 J. W. CHAPMAN, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. WALKER:

Q. Have you computed the interest on the Dee open account?
A. Yes, sir.

Mr. COGHLAN: That is objected to; that is a part of their direct case.
Mr. WALKER: What is the amount?
Mr. McFEE: We object. We certainly have not admitted interest.
The COURT: It is not introduced on the ground of admission.
Mr. McFEE: We object to it at this stage.
The COURT: Answer the question.
To which ruling of the court the defendants, by their counsel, then and there duly excepted.

Mr. WALKER:

Q. What is the amount due upon the principal and interest?
A. The principal and interest on Mr. Dee's account, $2,785.80. Interest figured up from the first of October, 1896, until the present time, to date.
Q. How much is the principal of the account and how much interest?
A. $2,389.36 principal; $396.54 interest.

Mr. McFEE:

Q. What per cent.?
A. Five.

Mr. WALKER: Have you figured interest on the Connelly notes?
A. Yes, sir.
Q. How much is it?

Mr. McFEE: We object. The Connelly notes do not call for interest.
667 The COURT: I have not seen the notes. I do not know. (The court here examined the said notes.) I suppose under our law they draw interest after due.

A. Interest on the note of $1,289.56 is $308.22, and the note of $1,850.36, with a payment of $148.00, is $386.06, making a total of $3,686.20, principal and interest, notes and interest.

Which was all the evidence introduced on the trial of the above-entitled cause.
At this point the jury were excused until 10 o'clock a. m. Monday, January 29th, 1900.
Whereupon Mr. Edwin Walker, of counsel for plaintiff, moved the court to charge the jury to return a verdict for the plaintiff in both cases, said motions, with the grounds therefor, being in words and figures as follows, to wit:

668 UNITED STATES OF AMERICA, }
*Northern District of Illinois, Northern Division.* }

In the Circuit Court Thereof.

UNION SEWER PIPE COMPANY }
*vs.* }
THOMAS CONNELLY. }

The plaintiff requests the court to charge the jury to return a verdict against the defendant, Thomas *Connelly, for the amount* of the notes sued on, and interest thereon at the rate of five per cent. per annum from the maturity of said note, for the following reasons or causes:

First. The execution of said notes is not denied by the defendant, nor has the same been paid or any part thereof.

Second. The plaintiff at the time of the purchase of the pipe in controversy was a corporation organized under the laws of the State of Ohio, with authority to purchase, sell, and manufacture sewer pipe, and had been engaged in such business from the date of its organization, to wit, about January first, 1893, with its principal office at the city of Akron, in the State of Ohio.

Third. Said pipe so purchased was delivered to the defendant, f. o. b. the cars at Akron, Ohio, for shipment to the defendant's place of business in the city of Chicago.

Fourth. Said pipe was received by the defendant and was sold by him prior to the commencement of this suit, but the de-
669 fendant has failed and refuses to pay for said pipe or any part thereof.

Fifth. The only defense interposed by the defendant is:

1st. That said complainant was organized for and was a trust, combination, or monopoly contrary to the provisions of the common laws.

2nd. That said plaintiff was a trust, combination, or corporation contrary to the Federal statutes of 1890.

3d. That said plaintiff was a corporation organized for the purpose of carrying on a trust or monopoly contrary to the statute of the State of Illinois of 1893, and that therefore all its contracts are illegal and void.

Sixth. There is no evidence that the incorporation of the plaintiff was contrary to either the common law or statutory law of the State of Ohio, or that its contract with the defendant for the sale and delivery of sewer pipe was contrary to said statute or common law, or that the same was void by reason thereof.

Seventh. Plaintiff's contract with the defendant for the sale and delivery of the pipe in controversy was not illegal or void or contrary to the Federal statutes of 1890.

Eighth. The statute of the State of Illinois of 1893 is unconstitutional and void. It is prohibited by the constitution of the State of

Illinois of 1870. It is prohibited by the fourteenth amend-
670 ment of the Constitution of the United States as being special legislation. It has not the essential principles of equality, as required by said Constitution.

Ninth. Even if the statute of 1893 of the State of Illinois was constitutional it has no territorial force or operation beyond the limits of the State of Illinois. It would not affect the validity of contracts made in the State of Ohio.

If the contract between the plaintiff and the defendant for the sale and delivery of the sewer pipe in controversy was valid under the laws of the State of Ohio at the time the contract was made, then it would be valid in the State of Illinois and elsewhere.

Tenth. The defendant under the law cannot receive and purchase of the plaintiff the pipe in controversy, sell and dispose of the same, and refuse to account for said sales on the alleged ground that the plaintiff was illegally organized or organized for illegal purposes.

Eleventh. The validity of the plaintiff's organization or incorporation cannot be attacked or set aside in these collateral proceedings. Under the evidence and the law the contracts between the plaintiff and the manufacturers of sewer pipe, as disclosed by the evidence, did not create a monopoly and were not in restraint of trade or contrary to the public policy of the State of Ohio.

671 Twelfth. Under all the evidence and proceedings in this case the defendant has not made good its defense, and therefore the verdict of the jury should be for the plaintiff.

HERBERT HAMLIN,
*Attorney for Plaintiff.*

EDWIN WALKER, *Of Counsel.*

Endorsed on back: United States circuit court. Union Sewer Pipe Company *vs.* Thomas Connelly. Motion for the direction of a verdict. Herbert Hamlin, plaintiff's attorney. Edwin Walker, of counsel.

672 UNITED STATES OF AMERICA, }
*Northern District of Illinois, Northern Division,* } *ss:*

In the Circuit Court Thereof.

UNION SEWER PIPE COMPANY }
*vs.*
WILLIAM E. DEE. }

The plaintiff, by its counsel, respectfully requests the court to charge the jury to return a verdict in favor of the plaintiff for the amount of its claim sued upon, to wit, twenty-three hundred and eighty-nine and $\frac{36}{100}$ dollars, with interest thereon from the first day of October, A. D. 1896, for the following reasons or causes:

First. The plaintiff at the time of the purchase of the pipe in controversy was a corporation, organized under the laws of the State of Ohio, with authority to purchase, sell, and manufacture sewer pipe, and had been engaged in such business from the date of its organ-

ization, to wit, about January 1, 1893, with its principal office at the city of Akron, in the State of Ohio.

Second. Said pipe so purchased was delivered to the defendant f. o. b. the cars at Akron, Ohio, for shipment to the defendant's place of business in the city of Chicago.

673 Third. Said pipe was received by the defendant and was sold by him prior to the commencement of this suit, but the defendant has failed and refuses to pay for said pipe or any part thereof.

Fourth. The only defense interposed by the defendant is:

1st. That said complainant was organized for and was a trust, combination, or monopoly contrary to the provisions of the common law.

2nd. That said plaintiff was a trust, combination, or corporation contrary to the Federal statutes of 1890.

3rd. That said plaintiff was a corporation organized for the purpose of carrying on a trust or monopoly contrary to the statute of the State of Illinois of 1893, and that therefore all its contracts are illegal and void.

Fifth. There is no evidence that the incorporation of the plaintiff was contrary to either the common law or statutory law of the State of Ohio, or that its contract with the defendant for the sale and delivery of sewer pipe was contrary to said statute of common law, or that the same were void by reason thereof.

Sixth. Plaintiff's contract with the defendant for the sale and delivery of the pipe in controversy was not illegal or void or contrary to the Federal statutes of 1890.

Seventh. The statute of the State of Illinois of 1893 is unconstitutional and void. It is prohibited by the constitution of the State of Illinois of 1870.

674 It is prohibited by the fourteenth amendment of the Constitution of the United States as being special legislation. It has not the essential principles of equality as required by said Constitution.

Eighth. Even if the statute of 1893 of the State of Illinois was constitutional, it has no territorial force or operation beyond the limits of the State of Illinois. It would not effect the validity of contracts made in the State of Ohio.

If the contract between the plaintiff and the defendant for the sale and delivery of the sewer pipe in controversy was valid under the laws of the State of Ohio at the time the contract was made, then it would be valid in the State of Illinois and elsewhere.

Ninth. The defendant, under the law, cannot receive and purchase of the plaintiff the pipe in controversy, sell and dispose of the same, and refuse to account for said sales on the alleged ground that the plaintiff was illegally organized, or organized for illegal purposes.

Tenth. The validity of the plaintiff's organization or incorporation cannot be attacked or set aside in these collateral proceedings. Under the evidence and the law, the contracts between the plaintiff and the manufacturers of sewer pipe, as disclosed by the evidence,

did not create a monopoly and were not in restraint of trade or contrary to the public policy of the State of Ohio.

675 Eleventh. Under all the evidence and proceedings in this case the defendant has not made good his defense, and therefore the verdict of the jury should be for the plaintiff.

HERBERT HAMLIN,
*Attorney for Plaintiff.*

EDWIN WALKER, *Of Counsel.*

Endorsed on back: "United States circuit court. Union Sewer Pipe Company *vs.* Wm. E. Dee. Motion for the direction of a verdict. Herbert Hamlin, plaintiff's attorney. Edwin Walker, of counsel."

And thereupon counsel for the respective parties presented arguments and cited authorities during the balance of this session; at the end of which the further hearing of arguments was adjourned to tomorrow, Saturday, January 27th, A. D. 1900, at 10 o'clock a. m.

676 CHICAGO, *January 27th*, 1900—10 o'clock a. m.

UNION SEWER PIPE COMPANY
*vs.*
THOMAS CONNELLY.

Court met pursuant to adjournment.

Present: Respective counsel for the respective parties as heretofore.

The arguments on the law and citation of authorities were then resumed, and at the conclusion thereof the court adjourned to 10 o'clock a. m., Monday, January 29th, 1900.

677 JANUARY 29, 10 o'clock a. m., 1900.

Court met pursuant to adjournment.

Counsel present same as before.

The COURT: In this case of The Union Sewer Pipe Company *vs.* Connelly, are counsel here?

The plaintiff in this case brings suit to recover upon certain promissory notes given by defendant for balance due on purchases and deliveries of sewer pipe.

Defendant pleads the general issue, and gives notice thereunder of three special defenses, all of which are based upon the theory that plaintiff was a trust or combination organized for the express purpose of creating and carrying out restrictions in trade, contrary—

1. To the common law in force both in Ohio and Illinois.

2. To the act of Congress of July 2, 1890, commonly called "the Sherman act;" and

3. To the statute of the State of Illinois taking effect on July 1, 1893.

As to the matters set out in the first notice of special defense, it is undoubtedly true that by the common law contracts which are themselves directly in restraint of trade may, in a proceeding based

thereon, be declared void and unenforcible by the courts; but there is no case brought to the attention of the court in which it has been held that at common law a contract not in itself in restraint of trade is void because one of the parties thereto is a party to
678 a contract which is in restraint of trade, and the one contract is indirectly based upon the other. The fact that one party to a contract is engaged in illegal acts will not at common law avail the other party as a defense to the enforcement of a contract in itself legal. The first notice of special defense will therefore be stricken out.

*It will be seen by an inspection* of the so-called "Sherman act" and of the opinion of Mr. Justice Peckham in the Addyson Pipe and Steel Company case, decided by the United States Supreme Court on December 4th, 1899, that the act only covers contracts which are themselves directly in restraint of trade, and does not affect those which "merely indirectly, remotely, incidentally, or collaterally regulate to a greater or less degree interstate commerce among the States." It therefore follows that the second matter of special defense set up must be stricken out.

Now, coming to the third ground of special defense set up on the third notice, to wit, the Illinois statute, which went into effect on July 1, 1893, this statute in terms provides that the defense herein set up may be maintained as a bar, and if the statute is valid, then the plaintiff cannot recover in this case, if it be, as averred by the defendant, a corporation organized in restraint of trade and a trust under the definition contained in said statute.

Plaintiff contends that the said statute is unconstitutional, first, because it is obnoxious to section 1 of the fourteenth amendment of the Federal Constitution, which reads in part as follows:

679 "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And also, second, because it is in contravention of section twenty-two of article four of the constitution of the State of Illinois, which reads, in part, as follows:

"In all other cases where a general law can be made applicable, no special law shall be enacted."

The said statute of July 1, 1893, after defining a trust and setting out the various penalties provided for violation of the act, provides, in section nine, that "the provisions of this act shall not apply to agricultural products of live stock while in the hands of the producer or raiser."

Can it be claimed that under this clause nine every person within the jurisdiction of the State of Illinois has equal protection of the laws? Is not this class legislation? Is it in accordance with section one of the fourteenth amendment to the Federal Constitution that those who produce or raise agricultural products or live stock shall be exempted from the provisions of the statute, which by its terms are binding upon every other citizen or person within the

State?" I think clearly not. I am of the opinion that this statute contains both class and special legislation and is in contravention of both the Federal and State Constitutions, and therefore void.

680 It is urged that granting the unconstitutionality of said ninth clause, yet it may be declared void without affecting the validity of the remaining clauses of said act. If this were so, then, by declaring said clause void, the courts would make the act binding upon those classes of persons within the State which the legislature had specially exempted from its provisions. This would be judicial legislation of the most flagrant character. In my opinion the said clause nine taints the whole act and renders it all void. Therefore the special defense set up in the third notice must be stricken out.

It follows upon the record as it is, with the said three matters of special defense stricken out, that a verdict must be given for the plaintiff for the face of the notes in suit, with interest thereon from maturity at five per cent., and the jury will be so instructed.

The reasons given in this case will govern the disposition of the Dee case, and, in view of the fact that a great deal of evidence has been taken upon the theory that said special defenses could be maintained, it can hardly be said that the delay involved was unreasonable or vexatious, upon which ground interest should not be allowed on the face of the open account.

There is no defense other than this set up in the three notices. In this matter the jury is directed to find for the plaintiff in the Connelly case for the amount of the notes and interest; what was the amount I don't remember.

681 To which ruling the defendants Connelly and Dee jointly and separately duly excepted.

Mr. HAMLIN: In the Connelly case $3,686.20, including interest.

The COURT: And in the Dee case?

Mr. HAMLIN: The Dee case, without interest, $2,389.26.

The COURT: Gentlemen, the court directs you to find a verdict for the plaintiff in these two sums.

Mr. McFEE: It is my duty to raise this point. I object to the verdict against the defendant Dee, because the jury has not been sworn to try the issues as between the plaintiff and the defendant Dee.

The COURT: Well, you have a stipulation here in open court that both of these matters should be submitted to them. Swear the jury in the Dee case.

Mr. McFEE: I object to the jury being sworn to try the Dee case after all the evidence is in.

The COURT: Swear the jury.

(Thereupon the jury was sworn in the Dee case in accordance with the order of the court.)

Mr. McFEE: I except to the swearing of the jury.

To which ruling of the court the defendants, by their counsel, then and there did duly except.

The COURT: Let the verdict be entered.

Mr. McFEE: I now move for a new trial and the same motion is made in the Connelly case. I also move in arrest of judgment.

The COURT: It will be necessary for you to file your assignment of errors.

Mr. McFEE: I simply save the point for what it is worth, and pray an appeal in both cases.

681½–682 Mr. WALKER: You don't mean an appeal, you mean that you sue out a writ of error.

The COURT: In this case the first move is to file your assignment of error. Then you will be in a position to pray for an appeal.

To which decision of the court and instruction by the court to the jury the defendants, by their counsel, did then and there duly except.

683 And on the twenty-eighth day of March, 1900, there was filed in the clerk's office of said court in said entitled causes a certain petition for writ of error in words and figures following, to wit:

*Petition for Writ of Error.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

In the United States Circuit Court Thereof.

UNION SEWER PIPE COMPANY *vs.* THOMAS CONNOLLY. } Gen. No., 24361.

UNION SEWER PIPE COMPANY *vs.* WILLIAM E. DEE. } Gen. No., 24362.

To the honorable the judge of said court:

Thomas Connolly, the defendant in the above-entitled cause of The Union Sewer Pipe Company *vs.* Thomas Connolly, and William E. Dee, defendant in the above-entitled cause of The Union Sewer Pipe Company *vs.* William E. Dee, the said causes having been by order of this honorable court consolidated, respectively show:

That they are each aggrieved by the verdict of the jury in the above-entitled causes respectively against them and the judgments rendered respectively in said causes on the 29th day of January, A. D. 1900, and that there is manifest error in the verdict of said jury and in the record and judgment of said court and in the orders of this court entered in said causes, apparent from the record of said causes.

684 Wherefore they pray that an order may be entered allowing said defendants to prosecute jointly a writ of error to the honorable the United States Supreme Court, under and according to the laws of the United States in that behalf made and provided, and that an order may be entered fixing the amount of security which each of the said defendants shall give and furnish upon said

writ of error, and that upon the giving of such security all further proceedings in this court may be suspended, superseded, and stayed until the determination of said writ of error by the United States Supreme Court; and

Your petitioners further prays that an order be entered allowing them to prosecute the said writ of error jointly upon the one record of said consolidated causes; and

Your petitioners will ever pray

O'DONNELL & COGHLAN,
*Attorneys for Thomas Connolly.*
JNO. R. McFEE AND
THOS. B. LANTRY,
*Attorneys for William E. Dee.*

(Endorsed:) Filed March 28, 1900. S. W. Burnham, clerk.

685 On the same day, to wit, the twenty-eighth day of March, 1900, came the defendants in said entitled causes and filed, by their attorneys, in the clerk's office of said court their assignment of errors in words and figures following, to wit:

*Assignment of Errors.*

UNITED STATES OF AMERICA,
*Northern District of Illinois, Northern Grand Division,* } *ss:*

In the Circuit Court Thereof.

UNION SEWER PIPE COMPANY
*vs.*
THOMAS CONNOLLY. } Gen. No., 24361.

UNION SEWER PIPE COMPANY
*vs.*
WILLIAM E. DEE. } Gen. No., 24361.

Assignment of errors.

Comes now Thomas Connolly, defendant in the above-entitled cause of The Union Sewer Pipe Company *vs.* Thomas Connolly, being cause No. 24361 in the December term, A. D. 1899, of this honorable court; and comes William E. Dee, defendant in the above-entitled cause of The Union Sewer Pipe Company *vs.* William E. Dee, being cause No. 24362 in the December term, A. D. 1899, of this honorable court, the said causes being consolidated herein, and jointly and severally say:

That in the record of this cause and in the rulings of the Honorable Christian C. Kohlsaat, judge of the circuit and district court of the United States in and for the northern district of the State of Illinois and of the seventh judicial circuit of the United States, presiding at the trial of said cause, and in the rulings of the said judge

on the admission and exclusion of evidence, and in the
686 rulings and order of said judge striking out the set-off notice attached to and filed with the pleas of each of said defendants in said cause, and in the verdict of the jury in said cause, and in the order of the said judge directing the verdict of the jury in said cause, and in the ruling and order of the said judge in overruling the motion for a new trial in said cause, and the motion in arrest of judgment upon the verdict in said cause, there is manifest error, and the said defendants jointly and severally do now assign and file assignment of errors upon which they jointly and severally will rely in their prosecution of the writ of error in the above-entitled cause:

I.

That the said court erred in striking out the notice of set-off contained in the notice of special defenses and set-off attached to the plea in said cause; which notice of set-off is in the words and figures following, to wit:

Take further notice that on the trial of this cause the defendant will give in evidence and insist that the plaintiff was before and at the time of the commencement of this suit and still is indebted to the defendant in the sum of seventy-six thousand and five hundred and twenty dollars, for that the plaintiff is and ever since the 1st day of January, 1893, was a combination in the form of a trust in restraint of trade and commerce between the State of Illinois and Ohio and between other States within the United States, and that by reason of the plaintiff being such a combination and as the direct, inevitable, and proximate result thereof the defendant has been injured in his business by reason of acts and things done by the plaintiff and forbidden and declared to be unlawful by an act of Congress of date June 2nd, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," to wit, the selling by the plaintiff, while residing and carrying on business in the State of Ohio, at divers times between the 25th day of February, 1893, and the 30th day of June, 1896, of divers goods and merchandise, to wit, sewer and drainage pipes, to the defendant while residing and carrying on business in the State of Ohio, which goods and merchandise the defendant was, by force of circumstances beyond the reasonable control of the defendant and wrongfully and designedly brought about solely by the plaintiff with
687 intent to coerce the defendant into purchasing said goods and merchandise, compelled to obtain from and purchase of the plaintiff at prices largely in excess of the true and real market price thereof—that is to say, the defendant was compelled, as aforesaid, to pay and did pay to the plaintiff for said sewer and drainage pipes shipped between said dates by the plaintiff from the State of Ohio to the defendant in the State of Illinois the sum of $23,840.00 over and in excess of the true and real market value thereof, whereby the defendant lost and was actually damaged in his business of a sewer contractor in the sum of $23,840.00; wherefore the defendant now claims, under and by virtue of the provisions of said act of Congress, by way of set-off against the plaintiff in this action, the said sum of $76,520.00, being three times the amount of his said

actual loss and damage, together with reasonable attorneys' fee, to wit, $5,000 and his costs of suit.

And take further notice that the defendant will also give in evidence and insist that the plaintiff was, and at the time of the commencement of this suit and still is, indebted to the defendant in the sum of twenty-three thousand eight hundred and forty dollars ($23,840.00), damages sustained by the defendant by reason of the plaintiff's becoming and since the 1st day of January, 1893, continuing to be and trade as a trust or combination of persons and corporations doing business in the States of Ohio and Illinois and between said States, organized for the express purpose of unlawfully and contrary to the provisions of an act of the legislature of the State of Illinois entitled "An act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void and making certain acts and violations thereof misdemeanors and proscribing punishment thereof and matters connected therewith, approved June 30th, 1893, in force July 1st, 1893," and that by reason of the plaintiff being and doing business as such a trust or combination, as aforesaid, the defendant was by force
688 of circumstances beyond his reasonable control, and which existed and were wrongfully and designedly brought about by the plaintiff with intent to coerce *of* the defendant into *to* purchasing only from the plaintiff, compelled to obtain from and did obtain from the plaintiff between the 25th day of February, 1893, and the 30th day of June, 1896, large quantities of certain merchandise, to wit, sewer and drainage pipes, and was compelled and did pay therefor the sum of $126,940.00, which amount was largely in excess of the true and real market value thereof, to wit, the sum of $103,100.00.

And take further notice that the defendant will give in evidence and insist that the plaintiff was, and before and at the time of the commencement of this suit and still is, indebted to the defendant in the sum of twenty-three thousand eight hundred and forty dollars, money had and received by the plaintiff to the use of the defendant, in that the plaintiff became on or about the 1st day of January, 1893, and has ever since continued to be and operate as a trust or combination of persons and corporations doing business in the State of Ohio and between said State and the State of Illinois, and organized and existing for the express and sole purpose of unlawfully controlling and regulating, in restraint of trade and contrary to the common law, the market prices of certain articles of commerce, to wit, sewer and drainage pipes; that the defendant was compelled, wholly by reason of the existence of such a trust or combination and of the pressure of circumstances beyond reasonable control of the defendant, and wrongfully and designedly brought about by the plaintiff with intent to coerce the defendant into purchasing only of the plaintiff, to purchase and did purchase from the plaintiff, acting and doing business as such a trust or combination, at various dates between the 25th day of February, 1893, and the 30th day of June, 1896, large quantities of said articles of commerce, of the true

and real market value of $103,100.00 and no more, at the unreasonable, exorbitant, fictitious, and compulsory price of $126,940.00.

689 And on the trial of this action the defendant will set off and allow to the plaintiff, against any true and lawful demand on its part, to be proved on such trial, so much of the said sums of money so due from the plaintiff to the defendant, as aforesaid, as will be sufficient to satisfy and discharge such demand.

And you will further take notice that at the trial of said cause the defendant will give in evidence and insist that all and singular the matters and defenses hereinbefore specially given notice of arose out of sales of goods, wares, and merchandise made by the plaintiff to the defendant, the prices of which are sought to be recovered in this action, and that such sales were made in furtherance of and connected with the unlawful conspination in the nature of a trust, as aforesaid, and that the prices charged for the said goods, wares, and merchandise so sold and the prices of other goods, wares, and merchandise sold and delivered by the plaintiff to the defendant and paid for by him were unreasonable and produced by the unlawful combination in the nature of a trust aforesaid, and that this defendant does set off the amount of such unreasonable prices so produced in excess of the actual value and reasonable prices at the time of such sales as damage to the plaintiff's demand in this action, and will ask judgment against the plaintiff for such sales as damage to the plaintiff's demand in this action, and will ask judgment against the plaintiff for such excess; and

You will take further notice that the defendant will do all this in connection with all and singular the other matters of set-off of which your have heretofore been given notice.

(Signed) JOHN REID McFEE,
THOMAS B. LANTRY,
O'DONNELL & COGHLAN,
*Attorneys for Defendants.*

690 And the court so erred for the following reasons, to wit:

(*a.*) The facts set out in the said special notice of set-off were proper defenses under the general law of the State of Illinois and the general law of the United States and the general law of the State of Ohio.

(*b.*) The facts set out in said special notice of set-off were proper defenses under the act of the General Assembly of the State of Illinois, being an Act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void and making certain acts in violation thereof misdemeanors, prescribing punishment therefor and the matters connected therewith, approved June 20th, in force July 1st, 1893, the said act being amendatory and supplemental to an act of the General Assembly entitled an Act to provide for the punishment of persons, copartners, or corporations forming pools, trusts, and combinations, and modes of procedure and rules of evidence in such cases, approved June 11th, 1891; in force July 1st, 1891.

(*c.*) The facts set out in the said special notices of set-off were proper defenses under the act of Congress of the United States of America

entitled "An act to protect trade and commerce against unlawful restraint and monopolies," approved July 2nd, 1890, and commonly known as the Sherman anti-trust act.

(d.) The damages set out in the said special notices of set-off were proper damages, allowable and recoverable under the act of Congress aforesaid, and under the bill of particulars filed in said cause in the words and figures following, to wit:

*Bill of Particulars of William E. Dee.*

Now comes the defendant and files this his bill of particulars, pursuant to the rule heretofore entered in the above-entitled cause, viz:

*First Set-off.*

Treble the amount of the actual damages sustained, allowed by act of Congress of date June 2nd, 1890, to wit:

| | | |
|---|---|---|
| 691 | Overcharge of 5% on 644 cars of ring pipe and fittings paid for by defendants between Feb. 24th, 1893, and June 30th, 1896, at the average price of about $500.00 per car, $16,100.00 | $48,300.00 |
| | Overcharge of 2½% on 512 cars of socket pipe paid for by defendant between Feb. 24th, 1893, and June 30th, 1896, at the average rate of about $600.00 per car, $7,680.00 | 23,040.00 |
| | Reasonable attorneys' fees allowed by said act | 5,000.00 |
| | | $76,340.00 |

*Second Set-off.*

| | |
|---|---|
| Actual damages sustained by the defendant by reason of plaintiff's violation of an act of the legislature of the State of Illinois entitled "An act to define trusts and conspiracies, etc., in force July 1st, 1893," as above set forth, of 5% more than market value *at* 644 cars of ring pipe and fittings, at average price of about $600.00 per car | $16,100.00 |
| Of 2½% more than market value of 512 cars of socket pipe, at average price of about $600.00 per car | 7,680.00 |
| | $23,780.00 |

*Third Set-off.*

To money had and received by plaintiff of defendant contrary to law, viz:

| | |
|---|---|
| 5% of $32,200.00 | $16,100.00 |
| 2½% of $307,200.00 | 7,680.00 |
| | $23,780.00 |

Respectfully submitted.

(Signed) RICHARD PRENDERGAST,
J. E. DEAKIN,
JOHN REID McFEE,
*Attorneys for Defendant.*

*Bill of Particulars of Thomas Connelly.*

Now cometh defendant and files this his bill of particulars pursuant to the rule heretofore entered in the above-entitled cause:

*First Set-off.*

Treble the amount of the actual damages sustained allowed by act of Congress of date June 2nd, 1890, to wit:

| | | |
|---|---|---|
| 692 | Overcharge of 5 % on 255 cars of ring pipe and fittings paid for by defendant between February 24th, 1893, and June 30th, 1896, at the average price of about $550.00 per car, $139,841.46, $6,992.07.. | $20,976.21 |
| | Overcharge of 2½ % on 688 cars of socket pipe paid for by defendant between February 24th, 1893, and June 30th, 1896, at the averate rate of about $600.00 per car, $10,331.41..... | 30,994.23 |
| | Amount paid, $413,256.76. | |
| | Reasonable attorneys' fees allowed by said act..... | 5,000.00 |
| | | $56,970.44 |

*Second Set-off.*

Actual damages sustained by the defendant by reason of plaintiff's violation of an act of the legislature of the State of Illinois entitled "An act to define trusts and conspiracies, etc., in force July 1st, 1893," as above set forth, of 5% more than market value, of about 255 cars of ring pipe and fittings, at an average price of about $550.00 per car, for which defendant paid the plaintiff $139,841.46, and of 2½ % more than market value of 688 cars of socket pipe, at an average price of $600.00 per car, on which the defendant paid to the plaintiff the sum of $413,256.76:

| | |
|---|---|
| Damages on ring pipe and fittings ..... | $6,992.07 |
| Damages on socket pipe ..... | 10,331.41 |

*Third Set-off.*

To money had and received by plaintiff of defendant contrary to law, viz:

| | |
|---|---|
| 5 % of $139,841.46..... | $6,992.07 |
| 2½ % of $413,256.76..... | 10,331.41 |
| | $17,323.48 |

Respectfully submitted.

(Signed) O'DONNELL & COUGHLAN,
RICHARD PRENDERGAST,
J. E. DEAKIN,
*Attorneys for Defendant.*

693 II.

The court erred in ruling, on the 24th day of January, A. D. 1900, during the progress of the trial of said cause, as follows: After full and extended argument and the citation of authorities by counsel for all parties in interest upon the foregoing questions, the court denied the motion to strike out the special matters of defense set up in the notices filed by defendants and allowed the motion to strike out the motion for claim of set-off; to which ruling of the court defendants, by their counsel, then and there duly excepted.

III.

The court erred in its ruling — the trial of said cause, on the 24th day of January, A. D. 1900, in sustaining the objection of the plaintiff to the motion of the defendants to file amendments to the notice of special defenses attached to the plea of general issue in said cause in the words and figures following, to wit:

*Notice of Special Defenses.*

To The Union Sewer Pipe Company, plaintiff in the above-entitled cause, and to Edwin Walker, Esq., and Herbert W. Hamlin, attorneys for said plaintiff:

Take notice that upon the trial of this cause the defendant will, in defense thereto, introduce in evidence and rely upon the special facts and matters hereinafter stated—that is to say:

First. That heretofore, to wit, a long period prior to the first day of January, A. D. 1893, the defendant was engaged in the business of a dealer and contractor in sewer and drainage pipe in the city of Chicago; that one of the principal features of the business of
694 the defendant was to furnish and supply a quality of sewer pipe for use by the city of Chicago and to furnish and supply sewer pipe for use by contractors with the city of Chicago for the construction and building of main sewers; that prior and up to the first day of January, A. D. 1893, the said defendant, William E. Dee, and his predecessor in business, William M. Dee, father of the said defendant, were engaged in said business; that prior to the first day of January, A. D. 1893, and for a period of at least five years theretofore and for a period of about five years thereafter the specifications issued by the city of Chicago for the construction of sewers provided that Akron sewer pipe should be used; that at such periods the commodity known as Akron sewer pipe had a trade designation and meaning and was universally understood to mean only such sewer pipe as was manufactured in Summit county, in the State of Ohio, and within a limited district of said county, known as the Akron district, and that prior to the first day of January, A. D. 1893, the said sewer pipe was manufactured exclusively by the following firms and corporations, to wit: Buckeye Sewer Pipe Company, the Summit Sewer Pipe Company, the National Sewer Pipe Company, the Akron Sewer Pipe Company, the Hill Sewer Pipe Company, Robinson Bros. Company, the Crown Sewer Pipe Com-

pany, the Camp & Thompson Sewer Pipe Company, the Sperry Sewer Pipe Company, and the Pennsylvania Sewer Pipe Company; that on or about the first day of January, A. D. 1893, all of the said companies enumerated confederated and combined together unlawfully and contrary to the common law and to the general law and statutes of the State of Illinois and of Ohio and contrary to the general law of the United States of America and *of* the law of the different States thereof and contrary to the statutes of the United States of America, for the purpose of limiting the production of sewer pipe known as Akron sewer pipe and of the different articles of merchandise manufactured and produced by the said firms and
695 corporations, and for the purpose of increasing the market prices thereof, and for the purpose of preventing competition in the manufacturing, making, transportation, sale, or purchase of said articles of commerce, and for the purpose of fixing standards of figures whereby the prices of said sewer pipe and articles of merchandise intended for sale, use, and consumption in the State of Ohio and in the State of Illinois and throughout the United States should be controlled and established; that on or about the first day of January, A. D. 1893, the said firms and corporations hereinbefore particularly named entered into a contract with the corporation known as The Union Sewer Pipe Company, the plaintiffs in this action, whereby they and each of them undertook and agreed to sell all the products of the factories of each of them through the medium of the said Union Sewer Pipe Company; that the said Union Sewer Pipe Company, under and by virtue of such agreement, notified the said defendant that any and all sewer pipe or other merchandise theretofore manufactured by any of the said firms or corporations and to be manufactured by any of the said firms and corporations could be purchased only from the said Union Sewer Pipe Company; that by reason of the said combination and by reason of the contract between the said Union Sewer Pipe Company and all of the said firms and corporations the said firms and corporations hereinbefore mentioned undertook and agreed to sell its products only to such persons as were named and designated by the said Union Sewer Pipe Company, and to fulfill only such contracts as were made, approved, or accepted by the said Union Sewer Pipe Company; that after said combination the said Union Sewer Pipe Company alone controlled the entire manufactured product and output of all of the said firms and corporations, and it was impossible for this defendant or any other person or persons whomsoever to purchase any of the commodity known as Akron sewer pipe from
696 the individual manufacturers or in any method other than through the medium of the said Union Sewer Pipe Company; that after the said Union Sewer Pipe Company in this manner entered into the business aforesaid the price of Akron sewer pipe was raised beyond the reasonable and ordinary price thereof and beyond the prices theretofore prevailing, and an excessive charge for the Akron sewer pipe was thereafter made to this defendant and to others dealing in and requiring said Akron sewer pipe for the purpose of their business and over and above the fair

market value thereof; that at the time of the contracts and agreements between the said Union Sewer Pipe Company and the firms and corporations aforesaid the said defendant was obligated to furnish large quantities of Akron sewer pipe to his customers and to sewer contractors within the city of Chicago; that the said defendant could not obtain any substitute for the said Akron sewer pipe and no substitute for the same existed, and that after the said Union Sewer Pipe Company began the transaction of business it notified this defendant that he must pay the increased prices demanded and prices unreasonable and in excess of the market value of the said sewer pipe and in excess of the prices prevailing prior thereto, or that said sewer pipe would not be furnished or supplied; that the defendant thereupon, by force of circumstances beyond his reasonable control and wrongfully and designedly and intentionally brought about solely by the plaintiff, was compelled to obtain the said merchandise and to pay for the same or to agree to pay for the same prices largely in excess of the true and real market price thereof, such prices being caused by reason of the said contracts and agreements; that at the time of the said contracts and agreements between the said Union Sewer Pipe Company and the firms and corporations aforesaid this defendant was a party to a contract between him and the firm of Camp and Thompson, one of the firms
697 entering into said agreement and contract with the said Union Sewer Pipe Company, whereby the said Camp and Thompson agreed to furnish and supply to this defendant three hundred and eight (308) car-loads of the said Akron sewer pipe for the supply of the customers of the said defendant in the said city of Chicago; that the said Camp and Thompson agreed to deliver the said three hundred and eight (308) car-loads in various installments and for the purpose of carrying out specific orders and contracts requiring the said aggregate amount of three hundred and eight (308) car-loads between the said contracts being entered into by the said defendant and various contractors within the city of Chicago, and that the requirements and needs of this defendant of the said three hundred and eight (308) car-loads for such purpose *was* known to the said Camp and Thompson and to the said plaintiff; that prior to the said contracts and agreements between the said plaintiff and the said firms and corporations the said Camp and Thompson had made partial shipments under the said agreement to supply the said three hundred and eight (308) car-loads of Akron sewer pipe to the said defendant; that after the said agreement and contract between the said plaintiff and the said firms and corporations the said plaintiff, The Union Sewer Pipe Company, acquired all of the rights of the said Camp and Thompson in and to the said contract, and assumed and agreed to perform all of the obligations of the said Camp & Thompson thereunder; that the price at which the said three hundred and eight (308) car-loads were to be delivered to this defendant was at the rate of eighty per cent. (80%) discount from the western list price, and that this sum equalled the amount of one hundred and twenty ($120.00) dollars a car-load; that the said price of one hundred and twenty ($120.00) dollars for an

averable car-load of said Akron sewer pipe was the prevailing market price thereof and was the fair and reasonable value thereof;
698 that as soon as the Union Sewer Pipe Company made deliveries to this defendant of portions of the said three hundred and eight (308) car-loads it demanded that this defendant pay an amount equal to seventy-five (75%) per cent. discount from the said western list price, and aggregating an increased price of thirty ($30.00) dollars for each of the said three hundred and eight (308) car-loads of the said Akron sewer pipe remaining to be delivered; that this defendant, by force of circumstances beyond his reasonable control, and wrongfully and designedly brought about solely by this plaintiff, was compelled to obtain the said sewer pipe and purchase the same at such prices which were largely in excess of the real market price thereof, and were purchased by reason of the contract between the said Union Sewer Pipe Company and the said firms and corporations, and that this defendant does set off the amount of said increased price on the said three hundred and eight (308) car-loads and on other sewer pipe which this defendant was so forced to purchase for the exigencies of his contracts in the city of Chicago as against the plaintiff's demand in this action, and does demand judgment for the amount thereof, as particularly set out in the bill of particulars filed by this defendant in this cause.

And you will further take notice that this defendant will urge all of the said defenses and will ask for all of the said set-offs in connection with all and singular the other matters and defenses of which you have heretofore been notified, and that this defendant does urge all of the said special matters herein stated in additional and in amendment to all and singular the other matters and things contained in the notice of special defenses and set-offs filed in this cause.

You will further take notice that at the trial of said cause the defendant William E. Dee will give in evidence and insist that heretofore, to wit, on, to wit, the 15th day of January, A. D. 1893, he
699 entered into a contract with a certain firm known as Camp & Thompson, manufacturers of pipe known as Akron pipe with its principal plant and office in Cuyahoga Falls, in the State of Ohio, by the terms whereof the said Camp & Thompson agreed to deliver during the year 1893 308 car-loads of pipe known and designated as city pipe, at and for a price equal to eighty per cent. discount from the list price of such pipe; that such contract was in existence and shipments thereunder were made at the time of the formation of the corporation known as the Union Sewer Pipe Company; that on the organization of the said Union Sewer Pipe Company and the beginning of business by the said Union Sewer Pipe Company, the Union Sewer Pipe Company assumed and agreed to perform the said contract; that after assuming and agreeing to perform the said contract the said Union Sewer Pipe Company made shipments thereunder, but failed and refused to accept the price of eighty per centum from the list price aforesaid, but demanded seventy-five per centum therefrom; that the defendant ordered said pipe for the purpose of fulfilling contracts made in the city of Chi-

cago for the building of sewers, and that he was under the necessity of delivering such pipe, and not pipe of any other quality or standard, in order faithfully to carry out the provisions of such contracts; that by reason thereof the said defendant was duressed into paying a price for said pipe equal to seventy-five per cent. discount from the list price thereof in lieu of eighty per cent. discount from the said list price, and by reason thereof he suffered damages to the extent of five per cent. upon each car-load delivered under the terms of said contract; and at the trial of said cause the said defendant will set off the said amount of such differences between seventy-five per cent. and eighty per cent. of such list price for all of the car-loads delivered under the contract aforesaid, and will ask judgment against the plaintiff for the excess of such amount over the amount in this action, if any.

(Signed) JNO. R. McFEE &
O'DONNELL & COGHLAN,
*Att'ys for Def't.*

700 And the court so erred in refusing to permit the said defendant to file the same amendments to the special defenses under their plea of general issue for the reason that the said amendments and each of them aver special matters of substantial defense under the general law and of the State of Ohio, and of the State of Illinois, and of the United States, and under the act of Congress aforesaid approved July 2nd, A. D. 1890, *and under the act of Congress aforesaid approved July 2nd, A. D. 1890,* and under the said act of the General Assembly of the State of Illinois, hereinbefore set out in this assignment of errors, approved June 20th, in force July 1st, 1893, said act being supplemental and amendatory to the said act, hereinbefore particularly mentioned in this assignment of errors, approved June 11th, A. D. 1891, in force July 1st, A. D. 1891.

IV.

The court erred in excluding the depositions of Frank S. Monnett, attorney general of the State of Ohio, for the reasons that the said depositions on their face showed that they were taken and certified under the law of the land and the practice of said court, and the said depositions contained testimony relevant to the issues in this cause, as follows:

*a.* They showed an admission of the president and other officers of the Union Sewer Pipe Company as to the effect of the contract between the said Union Sewer Pipe Company and its constituent members.

*b.* It showed the opinion of an experienced lawyer as to the contents and effect of a formal pleading filed by the said Union Sewer Pipe Company in a collateral suit, wherein they set up as against the plaintiff in such suit the defense that the said Union Sewer Pipe Company was a trust and an unlawful combination, in violation of the law of the State of Ohio and of the act of Congress.

701 *c.* It contained proof of the general and common law of the State of Ohio as to the effect of the contract between the

Union Sewer Pipe Company and its constituent members, to wit, that the said contract was violative of said law and deprived the Union Sewer Pipe Company of a right to maintain an action in the courts of Ohio to recover on a contract made with it in the course of its business.

*d*. It contained proof that the organization known as the Union Sewer Pipe Company was a trust and an unlawful combination in restraint of trade, contrary to the law of Ohio.

*e*. It contained proof of a proceeding instituted under the law of Ohio before the attorney general and the governor of said State on an application for a *quo warranto* proceeding against the said Union Sewer Pipe Company because of its being a trust and an unlawful combination in restraint of trade, contrary to the laws of the State of Ohio and the act of Congress, known as the Sherman anti-trust act, of July 2nd, A. D. 1890, and contained an admission at said trial and hearing by the officers of the said Union Sewer Pipe Company and its attorney at such hearing that the said Union Sewer Pipe Company was a trust and an unlawful combination in restraint of trade, contrary to the laws of said State and contrary to the said act of Congress, known as the Sherman anti-trust act, of July 2nd, A. D. 1890.

V.

The court erred in ruling and striking out an amendment filed by the defendants on the 26th day of January, A. D. 1900, the said amendment being in words and figures the same as the notice of special defense and of set-off hereinbefore set forth under the third assignment of error herein with the exception of the words "and does demand judgment for the amount thereof as particularly set out in the bill of particulars filed by this defendant in this
702 cause," being the last two lines in the second last paragraph and the words in the second line of the last paragraph, "and will ask for all of the said set-off," being omitted therefrom. The court so erred because it had permitted the filing of said amendments on the 26th dey of January, A. D. 1900, during the progress of said trial, as follows:

Mr. McFEE: If your honor please, I now ask leave to file two amendments: first, an amendment which is in the nature of a new notice, being the same which I offered before, with some alterations which have been submitted to Mr. Walker. The other amendment I have here, which simply asks the insertion after the word "common law in the State of Ohio," and we now want to insert "also common law in the State of Illinois."

Mr. WALKER: You file that as your amendment?

Mr. McFEE: I file this and file the other also. This amendment simply——

The COURT: Only goes to that point?

Mr. McFEE: Only goes to that point.

The COURT: All right; you can have your amendment.

Mr. WALKER: We wish to reserve an exception. We object to the filing of the other amendment, and our objection is overruled by the court, and we except.

And because the court subsequently denied that leave had been given to file said amendment, although the transcript of the proceedings in said cause shows the following occurring after the said amendment on the 26th day of January, A. D. 1900:

Mr. WALKER: I will ask you to state the purposes of that organization or incorporation.

Mr. McFEE: I object.

Mr. WALKER: I should not have asked that question, if your honor please, if it had not been for the amendment that has been filed here this afternoon with their notices of special defense.

703 In the notices they claim now that the company was organized for the purpose of advancing the prices, stifling competition, forming a monopoly, and doing a variety of other things that the law condemns. That issue is now fairly tendered on your notices.

Mr. McFEE: I withdraw my objection.

The COURT: I understood one of the amendments went to the Ohio common law.

Mr. McFEE: The other *mane*dment which I submitted to Mr. Walker—he did not object to that going in, and I also had an amendment as to the common law.

Mr. WALKER: I object to the whole thing.

Mr. McFEE: I had it go in and I submitted it to him.

The COURT: My purpose was simply to allow you to amend as to the common law.

Mr. McFEE: I filed an additional amendment. I have filed an elaborate amendment. I would like to save my exceptions, if your honor doesn't wish it in.

The COURT: It was not submitted to me.

Mr. WALKER: It is not only a statement of facts, but a statement of argument upon the fact.

The COURT: Your amendment will be limited to the matter I mentioned, which is giving you leave to amend, so as to set up the state of which you claim the benefit of the common law.

Mr. McFEE: Then we save an exception on that ruling.

The COURT: That is on your objection, Mr. Walker. You objected to the admission of this new matter.

Mr. WALKER: O yes; I objected to the whole thing. I think your honors is entirely right. I objected to the amendment, and I certainly do not think the amendment follows the direction of the court at all. I certainly do not remember, if your honor please, what the ruling of the court was upon this very question.

704 To which ruling of the court the defendant, by his counsel, then and there duly excepted.

The defendant William E. Dee separately assigns as error that the court erred in permitting the plaintiff to prove the alleged amount of indebtedness from the defendant Dee to the Union Sewer Pipe Company after the plaintiff had rested its case and after the defendant had closed his testimony and during the course of the rebuttal testimony of the plaintiff.

## VII.

The court erred in instructing the jury to find a verdict for the plaintiff and in charging the jury as follows:

"The plaintiff in this case brings suit to recover upon certain promissory notes given by the defendant for balance due on purchases and deliveries of sewer pipe. Defendants pleads the general issue and gives notice thereunder of three special defences, all of which are based upon the theory that plaintiff was a trust or combination organized for the express purpose of creating and carrying out restrictions in trade, contrary—

1. To the common law in force both in Ohio and Illinois;

2. To the act of Congress of July 2, 1890, commonly called 'the Sherman act;' and

3. To the statute of the State of Illinois taking effect on July 1, 1893.

As to the matters set out in the first notice of special defense, it is undoubtedly true that by the common law contracts which are themselves directly in restraint of trade may, in a proceeding based thereon, be declared void and unenforcible by the courts; but there is no case brought to the attention of the court in which it has been held that at common law a contract not in itself in restraint of trade is void because one of the parties thereto is a party to a con-
705 tract which is in restraint of trade, and the one contract is indirectly based upon the other. The fact that one party to a contract is engaged in illegal acts will not at common law avail the other party as a defense to the enforcement of a contract in itself legal. The first notice of special defense will therefore be stricken out.

It will be seen by an inspection of the so-called 'Sherman act,' and of the opinion of Mr. Justice Peckham in the Addyson Pipe & Steel Company case, decided by the United States Supreme Court on December 4, 1899, that the act only covers contracts which are themselves directly in restraint of trade, and does not effect those which 'merely indirectly remotely, incidentally, or collaterally regulate to a greater or less degree interstate commerce among the States.' It therefore follows that the second matter of special defense set up must be stricken out.

Now, coming to the third ground of special defense set up on the third notice, to wit, the Illinois statute which went into effect on July 1, 1893, this statute in terms provides that the defense herein set up may be maintained as a bar; and if the statute is valid, then the plaintiff cannot recover in this case, if it be, as averred by the defendant, a corporation organized in restraint of trade and a trust under the definition contained in said statute.

Plaintiff contends that the said statute is unconstitutional, first, because it is obnoxious to section 1 of the fourteen- amendment of the Federal Constitution, which reads in part as follows:

'No State shall make or enforce any law which shall
706 abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty

or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;' and also, second, because it is in contravention of section twenty-two of article four of the constitution of the State of Illinois, which reads, in part, as follows:

'In all other cases where a general law can be made applicable no special law shall be enacted.'

The said statute of July 1, 1893, after defining a trust and setting out various penalties provided for violation of the act, provides in section nine that 'the provisions of this act shall not apply to agricultural products of live stock while in the hands of the producer or raiser.'

Can it be claimed that under this clause nine every person within the jurisdiction of the State of Illinois has equal protection of the laws? Is not this class legislation? Is it in accordance with section one of the fourteenth amendment to the Federal Constitution that those who produce or raise agricultural products or live stock shall be exempted from the provisions of the statute which by its terms are binding upon every other citizen or person within the State? I think clearly not. I am of the opinion that this statute contains both class and special legislation and is in contravention of both the Federal and State constitutions, and therefore void.

It is urged that, granting the unconstitutionality of said ninth clause, yet it may be declared void without affecting the validity of the remaining clauses of said act. If this were so, then by declaring said clause void the courts would make the act binding upon those classes of persons within the State which the legislature has specially exempted from its provisions. This would be
707 judicial legislation of the — flagrant character. In my opinion the said clause nine taints the whole act and renders it all void. There- the special defense set up in the third notice must be stricken out.

It follows, upon the record as it is with the said three matters of special defense stricken out, that a verdict must be given for the plaintiff for the face of the notes in suit, with interest thereon from maturity at five per cent., and the jury will so be instructed.

The reasons given in this case will govern the disposition of the Dee case, and, in view of the fact that a great deal of evidence has been taken upon the theory that said special defenses could be maintained, it can hardly be said that the delay involved was unreasonable or vexatious, upon which ground interest should be allowed on the face of the open account. There is no evidence other than this set up in the three notices. In this matter the jury is directed to find for the plaintiff in the Connolly case for the amount of the notes and interest."

The court so erred for the following reasons, to wit:

*a.* At the close of the testimony in behalf of the defendant no motion was made to exclude said testimony and the defense supported thereby and to instruct the jury at such time to find and return a verdict for the plaintiff.

*b.* At the close of the testimony in rebuttal no motion was made

on behalf of the plaintiff to exclude the testimony and to instruct the jury to find and return a verdict for the plaintiff.

*c.* At the close of the evidence in surrebuttal no motion was made to exclude the testimony and to instruct the jury to find and return a verdict for the plaintiff.

*d.* At the close of all the testimony in the case no motion was made on behalf of the plaintiff to exclude the testimony and to
708 instruct the jury to find and return a verdict for the plaintiff.

*e.* The court in instructing the jury to find a verdict for the plaintiff erred in ruling that although the plaintiff was an unlawful combination, in restraint of trade, under the general and common law, both of the State of Ohio and of the State of Illinois, nevertheless such fact was not a defense to the action.

*f.* In ruling that no contract in this cause was sued upon which in itself was in restraint of trade, whereas a written contract between the plaintiff and the defendant Dee in restraint of trade *of* and void under the common and general law, both of the State of Ohio and of the State of Illinois, constituted the foundation of the plaintiff's cause of action; which contract was in the words and figures following, to wit:

Memorandum of an agreement made and entered into this 20th day of August A. D. 1895, between the Union Sewer Pipe Company, of the city of Akron, county of Summit and State of Ohio, party of the first part, and Wm. E. Dee, of the city of Chicago, county of Cook, State of Illinois, party of the second part, witnesseth:

The party of the first part agrees to sell and deliver to the party of the second part sewer pipe, free on board cars, at its factories at the following discounts off the western price-list, to wit:

| | |
|---|---|
| First-class socket pipe, from 2″ to 20″ inclusive | 85 % |
| 24″ socket pipe | 80 % |
| 6″ and 9″ ring pipe with rings | 85 % |
| 10″ and large ring pipe with rings | 75 % |
| All sizes second-class socket pipe | 90 % |
| All sizes second-class ring pipe and rings | 87½ % |
| 709 All sizes second-class ring pipe without rings | 90 % |
| Ring cull pipe with rings | 85 % |
| Ring cull pipe without rings | 87½ % |

All shipments by said first party in any one month to be settled for by note or acceptance of the second party, payable at bank in Chicago in ninety days from the tenth (10th) of the month following the month in which shipments are made, or if preferred by said second party settlements may be made in cash by the tenth of the month following the month in which the shipment is made and for such cash settlement an additional discount of two per cent. (2%) on the net amount may be deducted from the bill, but in no case will the first party accept city or town warrants in settlement of said shipment.

710 In consideration of the foregoing agreement the party of the second part agrees to purchase and handle exclusively,

the sewer pipe handled and sold by the first party except when the first party is unable to furnish the party of the second part, and to place with the first party all orders for sewer pipe that they, the second part-, may make.

In consideration of receiving the entire trade for sewer pipe from party of the second part, it is agreed by party of the first part that a rebate of one per cent. (1%) of the gross sales be allowed said second party. Said rebate to be paid second party at the close of each year provided the terms of this agreement have been faithfully carried out.

It is further agreed between said first and second parties that said first party will supply the second party, twenty-five car-loads of socket pipe of sizes 2" to 20" inclusive at 87½ discount f. o. b. car works. The above rebate of one per cent. will not apply on the pipe sold at 87½ discount.

It is further agreed that said first party permits said second party to purchase twenty-five cars of sewer pipe from H. B. Camp, Greentown, Ohio, and twenty-five car-loads of pipe from the Chicago Sewer Pipe Company, Brazil, Indiana, but no more, and said second party consents to allow said first party access to his books to determine when above pipe has been delivered.

The said second party further agrees to sell on and after Sept. 1, '95, all sewer pipe purchased from the party of the first part free on board cars in car-load lots, or at their respective yards or places of business, in the city of Chicago, or in Cook county at the following discounts from the western price-list, namely:

| | | |
|---|---|---|
| 6" and 9" ring pipe with rings and socket pipe up to and including 20", on yard | 70 % | off list. |
| 24" socket pipe on yard | 60 | off list. |

By car-load lots f. o. b. cars in Chicago:

| | | |
|---|---|---|
| 6" and 9" ring pipe and rings and socket pipe up to and including 20" | 75 | off list. |
| 24" socket pipe | 67½ % | " |

711 In no case shall seconds or culls be shipped by first party for use within the corporate limits of the city of Chicago.

Upon receipt of satisfactory evidence of violation of the terms of this agreement by said second party it is agreed between the first and second parties that it remains optional with the first party to cancel this contract with the second party and the first party will refuse to sell pipe to said second party.

This contract may be terminated by either party giving the other thirty days' written notice of such desire.

In witness whereof, we have hereunto affixed our hands and seals on the day and date first above written.

THE UNION SEWER PIPE CO.

(Signed) WM. E. DEE.

B. W. ROBINSON, *Sec'y.*

In defendant Connelly's contract the name Thomas Connelly was inserted where the words William Dee are contained in the above.

*g.* Because the court erred in ruling and instructing the jury to find and return a verdict for the plaintiff against both of said defendants that the cause of action was not a contract in itself in restraint of trade, whereas the declaration in this cause sued under the common counts for goods bargained and sold under and in pursuance of a contract in writing between both defendants and the plaintiff void as in restraint of trade under the common and general law, both of the State of Ohio and of the State of Illinois.

*h.* The court erred in instructing the jury to find and return a verdict for the plaintiff; ruled that the defense set up in the special notice of defense that the cause of action in this case was barred by the said act of Congress of July 2nd, 1890, commonly known as the Sherman anti-trust act, was not a proper defense.

*i.* Because the court erred in instructing the jury to find and return a verdict for the plaintiff; expressly ruled that the act of July 1st, 1893, of the legislature of the State of Illinois, amendatory and supplemental to the said act of the General Assembly entitled "An act to provide for the punishment of persons, copartners or corporations forming pools, trusts and combinations and modes of procedure and rules of evidence in such cases. Approved June
712 11th, A. D. 1891, in force July 1st, A. D. 1891," was unconstitutional and void and in conflict with the fourteenth amendment of the Constitution of the United States, whereas the said act is not violative of the Constitution of the United States or any amendment thereto; said act is in the words and figures following, to wit:

Act of 1893.

SEC. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of two or more of them for either, any or all of the following purposes: First—to create or carry out restrictions in trade. Second—to limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third—to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities. Fourth—to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established upon any article or commodity of merchandise, produce or manufacture intended for sale, use or consumption in this State; or to establish any pretended agency whereby the sale of any such article or commodity shall be covered up and made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor or manufacturer to control the wholesale or retail price of any such article or commodity after the title to such article or commodity *after the title to such article or commodity* shall have passed from such vendor or manufacturer. Fifth—to make or enter into, or examine or carry out any contract, obligation or agreement of any kind or

description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or card or price-list, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity,
713 or by which they shall agree to pool, combine or unite any interest they may have in connection, with the sale or transportation of any such article or commodity that its price might in any manner be affected.

SEC. 2. That any corporation holding a charter under the laws of this State which shall violate any of the provisions of this act shall thereby forfeit its character and franchise, and its corporate existence shall cease and determine.

SEC. 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the attorney general or prosecuting attorney, upon his own motion to institute suit or *quo warranto* proceedings, at any county in this State (in) which such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

SEC. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the attorney general to enforce this provision by injunction or any other proper proceedings, in any county in which such foreign corporation does business, in the name of the State on his relation.

SEC. 5. Any violation of either or all of the provisions of section 1 of this act shall be and is hereby declared to be a conspiracy against trade, and a misdemeanor; and any person who may be or may become engaged in any such conspiracy or take part therein or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant, or employé, or in any other capacity knowingly carry out any of the stipulations, purposes, prices, rates, orders thereunder or in pursuance thereof shall be punished by fine not less than two thousand dollars or more than five thousand dollars.

SEC. 6. In any indictment or information for any offense named in this act. It is sufficient to state the purposes and effect of a trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how or where it was created.

SEC. 7. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it,
714 without proving all the members belonging to it, or proving or producing any article of agreement or any written instru-

ment on which it may have been based, or that it was evidenced by any written instrument at all.

SEC. 8. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforcible either in law or equity.

SEC. 9. The provisions of this act shall not apply to agricultural products or live stock while in the hands of producer or raiser.

SEC. 10. Any purchaser of any article or commodity, from any person, firm, corporation or association of persons, or of two or more of them, transacting business contrary to any provision of the preceding sections of this act, shall not be liable for the price or payment of such article or commodity and may plead this act as a defense to any suit for such price or payment.

Act of 1891.

Be it enacted by the People of the State of Illinois, represented in General Assembly.

SEC. 1. If any corporation organized under the law of this State or any other State or country, for transacting or conducting any kind of business in this State, or any partnership or individual or other association of persons whosoever, shall create, enter into become a member of, or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix a price of any article of merchandise or commodity, or shall enter into, become a member of or party to any pool, agreement, contract combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, such corporation, partnership, or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment, as provided in this act.

SEC. 2. It shall not be lawful for any corporation to issue or to own trusts certificates, or for any corporation, agent, officer, or employees, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person
715 or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured products thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article.

SEC. 3. If a corporation or a company, firm or association shall be found guilty of a violation of this act, it shall be punished by a fine in any sum not less than five hundred ($500) dollars, or more than two thousand dollars ($2,000), for the first offense; and for the second offense not less than two thousand dollars ($2,000), nor more than five thousand dollars ($5,000); and for the third offense not less than five thousand dollars ($5,000), nor more than ten thousand

dollars ($10,000); and for every subsequent offense and conviction thereof, shall be liable to a fine of fifteen thousand dollars ($15,000): Provided, that in all cases under this act either party shall have the right of trial by jury.

SEC. 4. Any president, manager, director or other officer or agent or receiver of any corporation, company, firm or association, or any member of any company, firm or association, or any individual, found guilty of the violation of the first section of this act, may be punished by a fine of not less than two hundred dollars ($200), nor to exceed one thousand dollars ($1,000), or be punished by confinement in the county jail not to exceed one year, or both, in the discretion of the court before which such conviction may be had.

SEC. 5. Any contract or agreement in violation of any provision of the preceding section of this act shall be absolutely void.

SEC. 6. Any purchaser of any article or commodity from any individual, company, or corporation transacting business contrary to any provisions of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment.

SEC. 7. The fines hereinbefore provided for may be recovered in an action of debt in the name of the people of the State of
716 Illinois. If, upon the trial of any cause instituted under this act to recover the penalties as provided for in section 3, the jury shall find for the people, and that the defendant has been before convicted of a violation of the provisions of this act, they shall return such finding with their verdict, stating the number of times they find the defendant so convicted and shall assess and return with their verdict the amount of the fine to be imposed upon the defendant in accordance with said section 3; provided, that in all cases under the provisions of this act a preponderance of evidence in favor of the people shall be sufficient to authorize a verdict and judgment for the people.

SEC. 7*a*. It shall be the duty of the secretary of state, on or about the first day of September of each year to address to the president, secretary or treasurer of each incorporated company doing business in this State whose post-office address is known or may be ascertained a letter of inquiry as to whether the said corporation has all or any part of its business or interests in or with any trust, combination or association of persons or stockholders, as named in the preceding provisions of this act, and to require an answer under oath, of the president, secretary or treasurer or any director of said company; a form of affidavit shall be enclosed in said letter of inquiry, as follows:

STATE OF ILLINOIS, }
*County of* ——, } *ss*:

*Affidavit.*

I, —— ——, do solemnly swear that I am the — (president, secretary, treasurer, *of* director), of the corporation known and styled

——, duly incorporated under the laws of ——, on the — day of ——, 18—, and now transacting or conducting business in the State of Illinois, and that I am duly authorized to represent said corporation in the making of this affidavit; and I do further solemnly swear that the said —— ——, known and styled as aforesaid, has not since the — day of —— (naming the day on which this act takes effect) created, entered into, or become a member of or a party to, and was not on the — day of ——, nor at any day since that
717 date and is not now, a member of or a party to any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons to regulate or fix the price of any article of merchandise or commodity, and that it has not entered into or become a member of or a party to any pool, trust, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced or sold in this State, and that it has not issued and does not own any trust certificates, and for any corporation, agent, officer, or employee, or for the directors or stockholders of any corporation, has not entered into and is not now in any combination, contract, or agreement with any person or persons, corporation, or corporations, or with any stockholders or director thereof, the purpose and effect of which said corporation, contract, or agreement would be to place the management or control of such combination or combinations, or the manufactured product thereof in the hands of any trustee or trustees with the intent to limit or fix the price or lessen the production and sales of any article of commerce, use, or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article.

—— ——,

(*President, Secretary, Treasurer, or Director.*)

Subscribed and sworn to before me, a — within and for the county of ——, this — day of ——, 18—.

—— ——.

And on refusal to make oath in answer to said inquiry or on failure to do so within thirty days from the mailing thereof the secretary of state shall certify that fact to the attorney general, whose duty it shall be to direct the State's attorney of the county wherein such corporation or corporations are located, and it is hereby made the duty of the State's attorney, under the direction of the attorney general, at the earliest practicable moment in the name of the people of the State of Illinois and at the relation of the attorney general, to proceed against such corporation for the recovery of a pen-
718 alty of fifty dollars, for each day after such refusal to make oath, or failure to make said oath within the thirty days of the mailing of said notice, or the attorney general may, by any proceeding in a court of law or chancery, proceed upon such failure or refusal to forfeit such charter or of such incorporated company or association incorporated under the general laws or by any special

law of this State, *or by any special law of this State*, and to revoke the rights of any foreign corporation located herein to do business in this State. (Added by act approved June the 20th, 1893. In force July 1st, 1893.)

SEC. 7*b*. It shall be the duty of the secretary of state, at any time, upon satisfactory evidence that any company or association or persons, duly incorporated under the laws of this or any other State, doing business in this State, has entered into any trust, combination or association in violation of the preceding sections of this act, to demand that it shall make the affidavit as above set forth in this act, as to the conduct of its business. In case of failure of compliance on the part of the corporation, then the same procedure shall ensue as is provided in section 7*a* of this act; provided, that no corporation, firm, association or individual shall be subject to any criminal prosecution by reason of anything truthfully disclosed by the affidavit required by this act, or truthfully disclosed in any testimony elicited in the execution thereof.

The secretary of state is hereby authorized and required to charge and collect of each corporation, a fee of one dollar for receiving and filing the affidavit herein provided for, to be accounted for as other fees received by him. To enable the secretary of state to discharge the additional duties involving upon him in the execution of this act, there is hereby appropriated, out of any funds in the State treasury, not otherwise appropriated, or so much thereof as may be necessary, the sum of six thousand dollars per annum, payable to the secretary of state on his order upon proper vouchers as required by law; provided, that corporations organized under the Building, Loan, and Homestead Association laws of this State are excluded from the provisions of this act. (Added by act approved June 20th, 1893. In force July 1st, 1893.)

SEC. 8. It shall be the duty of the prosecuting attorneys from their respective jurisdictions and the attorney general, to en-
719 force the foregoing provisions of this act and any prosecuting attorney of any county, securing a conviction under the provisions of this act shall be entitled to such fee or salary as by law he is allowed for such prosecution. When there is a conviction under this act the informer shall be entitled to one-fifth of the fine, recovered, which shall be paid him when the same is collected. All fines recovered under the provisions of this act shall be paid into the county treasury of the county in which the suit is tried by the person collecting the same, in the manner now provided by law to be used for county purposes.

*j*. The court erred in instructing the jury to find and return a verdict for the plaintiff; ruled that the 9th clause of the said act of July 1st, 1893, of the legislature of the State of Illinois was in violation of the 14th amendment of the Constitution of the United States.

*k*. The court erred in instructing the jury to find and return a verdict for the plaintiff; ruled that because clause nine of the said act of July 1st, 1893, of the legislature of the State of Illinois was

unconstitutional under the 14th amendment to the Constitution of the United States the whole act was void, whereas the said ninth clause was not in violation of the said 14th amendment to said Constitution, and even if the same were in violation thereof the entire act would not, in consequence thereof, be void.

*l.* The court erred in instructing the jury to find and return a verdict for the plaintiff in not holding that if the said act of July 1st, 1893, were unconstitutional and void, that thereupon the said act of July 1st, 1891, of which the said act of July 1st, 1893, was *an* amendatory and supplemental, would be revived, and that the defense set up in the special notice attached to the defendants' plea were admissible under the said act of July 1st, 1891.

VII.

That the court erred in its opinion instructing the jury to find and return a verdict for the plaintiff — was guilty of manifest error in the statement of facts and conclusions of law therein contained, and the defendant Dee specially and severally assigned as error that the jury was not sworn to try the issues between him and the said Union Sewer Pipe Company until the close of the case and after the jury was instructed to find a verdict against him.

720

VIII.

That the verdict of the jury in said cause is contrary to law.

IX.

That the said court erred in rendering judgment against the defendants in said cause upon the pleadings in said cause, and that said judgment is contrary to the law and the evidence as stated in the pleadings in said cause.

X.

That the said court erred in deciding and adjudging that the amendments filed and the amendments offered to be filed by the defendants to the notice of special defenses under their plea of general issue in said cause did not state facts sufficient to constitute a defense to the cause of action in the plaintiff's declaration contained.

XI.

That the court erred in deciding and adjudging that the amendments filed and the amendments offered to be filed by the defendants to the notice of special defenses under their plea of general issue in said cause did not state facts sufficient to constitute a counter-claim to the cause of action in the plaintiff's declaration contained.

XII.

The court erred in excluding testimony in reference to contracts for two hundred car-loads of sewer pipe between Camp & Thompson and Thomas Connelly and for 308 car-loads for William E. Dee, entered into before the formation of the Union Sewer Pipe Company

and admitted by the plaintiff, that the contract was assumed by it after its organization, and that it started to carry out the said contract, but never fulfilled the same according to the terms, for which breach of contracts the said Thomas Connelly and William E. Dee should have been allowed to set off damages against the Union Sewer Pipe Company for the additional 5 % he was compelled to pay by reason of the Union Sewer Pipe Company assuming the contract and failing to carry it out, and billing the cars to him at such advance price, which was part of the money sought to be recovered from him by plaintiff in the case.

XIII.

The court erred in denying the right of defendants to read cross-examination of witness Harry Thompson, called on behalf
721 of plaintiff, as their own witness, who testified to a contract made by him with Thomas Connelly and William E. Dee, defendants, for two hundred and 308 car-loads, respectively, *cars* of sewer pipe, which contract was subsequently assumed by the Union Sewer Pipe Co. and carried out by the said company at an advance of 5 % over the price contracted, notwithstanding that this witness was examined on the direct examination by attorneys for plaintiff touching all these points.

XIV.

The court erred in overruling the defendants' motion in arrest of judgment.

Wherefore, for these and other manifest errors apparent on the face of the record in said cause, the defendants, Thomas Connelly and William E. Dee, plaintiffs in error herein, jointly and severally pray that the judgment of the said court may be reversed, and that such directions by given that full force and efficancy may inure to the defendants by reason of the defenses set up in their special notice of defenses and in their notice of set-off attached to and filed with their plea in this cause and all amendments to such notices.

O'DONNELL & COUGHLIN,
*Attorneys for Plaintiff in Error Thomas Connolly.*
JNO. R. McFEE AND
THOS. B. LANTRY,
*Attorneys for Plaintiff in Error William E. Dee.*

(Endorsed:) Filed Mar. 28, 1900. S. W. Burnham, clerk.

722 On the same day, to wit, the twenty-eighth day of March, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

*Order of March* 28, 1900.

UNION SEWER PIPE COMPANY
*vs.*
THOMAS CONNOLLY. } 24361.

and

UNION SEWER PIPE COMPANY
*vs.*
WILLIAM E. DEE. } 24362.

Upon motion of O'Donnell and Coghlan, Esqs., attorneys for the defendant Thomas Connolly, and upon motion of John R. McFee and Thomas B. Lantry, attorneys for the defendant William E. Dee, and upon filing a petition for a writ of error and an assignment of errors, it is ordered—

That a writ of error be, and it hereby is, allowed, to have reviewed in the United States Supreme Court the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and hereby is, fixed as follows: the bond to be given by the defendant Thomas Connolly, seven thousand dollars; the bond to be given by the defendant William E. Dee, seven thousand dollars.

723 And on the second day of April, 1900, came Thomas Connelly, as principal, and Roger C. Sullivan, as surety, and filed in the clerk's office of said court a certain bond on writ of error in words and figures following, to wit:

*Thomas Connelly's Bond on Writ of Error.*

Know all men by these presents that we, Thomas Connelly, of Chicago, as principal, and Roger C. Sullivan, of Chicago, as surety, are held and firmly bound unto the Union Sewer Pipe Company of Akron, Ohio, a corporation, etc., in the full and just sum of seven thousand ($7,000) dollars, to be paid to the said The Union Sewer Pipe Company of Akron, Ohio, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of April, in the year of our Lord one thousand nine hundred.

Whereas, lately, at a term of the circuit court of the United States in and for the northern district of Illinois, in a suit depending in said court between The Union Sewer Pipe Company of Akron, Ohio, and Thomas Connelly, of Chicago, Illinois, a judgment was rendered against the said Thomas Connelly, and the said Thomas Connelly having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Union Sewer Pipe Company of Akron, Ohio, citing and admonishing it to be and appear at a

Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Thomas Connelly shall prosecute his writ of error to effect
724 and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

THOMAS CONNELLY. [SEAL.]
ROGER C. SULLIVAN. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved April 2, 1900.
KOHLSAAT, *J.*

(Endorsed:) Filed April 2, 1900. S. W. Burnham, clerk.

725 And on the second day of April, 1900, came William E. Dee, as principal, and Maurice J. Healy, as surety, and filed in the clerk's office of said court a certain bond on writ of error in words and figures following, to wit:

*William E. Dee's Bond on Writ of Error.*

Know all men by these presents that we, William E. Dee, as principal, and Maurice J. Healy, as sure*ties*, are held and firmly bound unto the Union Sewer Pipe Company, a corporation under the laws of the State of Ohio, in the full and just sum of seven thousand ($7,000) dollars, to be paid to the said Union Sewer Pipe Company, its certain attorney, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this second day of April, in the year of our Lord one thousand nine hundred.

And whereas lately, at the December term, A. D. 1899, of the circuit court of the United States in and for the northern district of Illinois, in a suit pending therein, wherein the said Union Sewer Pipe Company was plaintiff and the said William E. Dee was defendant, being cause number 24362 on the docket of said court, a judgment was rendered on the 29th day of January, A. D. 1900, in favor of the said plaintiff and against the said defendant, William E. Dee, for the sum of twenty-three hundred eighty-nine and twenty-six one-hundredths ($2,389.26) dollars; and whereas the said William E. Dee has sued out a writ of error to the Supreme Court of the United States to reverse the judgment in said cause rendered therein by the circuit court of the United States in and for
726 the northern district of Illinois, and has obtained said writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment aforesaid, and a citation directed to the said Union Sewer Pipe Company, citing and admonish-

ing it to be and appear at the Supreme Court of the United States, to be holden in the city of Washington, in the District of Columbia, within thirty (30) days from the date thereof:

Now, therefore, the condition of the above obligation is such that if the said William E. Dee shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then this obligation to be void; otherwise to remain in full force and virtue.

WILLIAM E. DEE, [SEAL.]
MAURICE J. HEALY, [SEAL.]
2977 *Keeneen Ave., Edgewater.*

Approved April 2, 1900.
KOHLSAAT, *J.*

(Endorsed:) Filed April 2, 1900. S. W. Burnham, clerk.

727 NORTHERN DISTRICT OF ILLINOIS, } ss:
*Northern Division,* }

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above to be a true and complete transcript of all the proceedings had in said court in the causes entitled Union Sewer Pipe Company *vs.* Thomas Connolly and Union Sewer Pipe Company *vs.* William E. Dee, as the same appear from the original records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Chicago, in said district, this — day of April, 1900.

[Seal U. S. Circuit Court, Northern Dist. Illinois, 1855.]

S. W. BURNHAM, *Clerk.*

728 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Union Sewer Pipe Company, plaintiff, *vs.* Thomas Connolly, defendant, and Union Sewer Pipe Company, plaintiff, *vs.* William E. Dee, a manifest error hath happened, to the great damage of the said Thomas Connolly and William E. Dee, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the

record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of March, in the year of our Lord one thousand nine hundred.

[Seal U. S. Circuit Court, Northern Dist. Illinois, 1855.]

S. W. BURNHAM,
*Clerk of the Circuit Court of the United States*
*for the Northern Dist. of Illinois.*

Allowed by—
CHRISTIAN C. KOHLSAAT,
*District Judge.*

Filed Mar. 28, 1900.

S. W. BURNHAM, *Clerk.*

729 [Endorsed:] 24361 & 24362. Supreme Court of the United States. —— —— *vs.* —— ——. Writ of error. Filed March 28, 1900. S. W. Burnham, clerk. Copy deposited for the defendant in error in the clerk's office, U. S. circuit court, northern district of Illinois.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ I herewith transmit to the Supreme Court of the United States of America a true and complete transcript of the record and proceedings in the foregoing cause this 19th day of April, A. D. 1900.

[Seal U. S. Circuit Court, Northern Dist. Illinois, 1855.]

S. W. BURNHAM,
*Clerk United States Circuit Court,*
*Northern District of Illinois.*

730 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Union Sewer Pipe Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error and copy filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, northern division, wherein Thomas Connolly and William E. Dee are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Peter S. Grosscup, judge of the circuit court

of the United States, this 28th day of March, in the year of our Lord one thousand nine hundred.

PETER S. GROSSCUP,
*Circuit Judge.*

731 [Endorsed:] No. —. Supreme Court of the U. S. Union Sewer Pipe Company *vs.* Thomas Connolly and William E. Dee. Citation. Returnable —— —, 189–. —— ——, clerk. Filed —— —, 189–. —— ——, clerk.

*On this 19th day of April*, in the year of our Lord one thousand nine hundred, personally appeared George W. Lyons before me, the subscriber, Jennie V. Engstrom, a notary public in and for the county of Cook and State of Illinois, and makes oath that he delivered a true copy of the within citation this day to Edwin Walker at the city of Chicago, Ill., and that he knows *that* the said Edwin Walker to be the attorney for the defendant in error mentioned in the within citation.

GEORGE W. LYONS.

Sworn to and subscribed the 19th day of April, A. D. 1900.

[Seal of Jennie V. Engstrom, Notary Public, Cook County, Ill.]

JENNIE V. ENGSTROM,
*Notary Public.*

Filed April 19, 1900.

S. W. BURNHAM, *Clerk.*

732 UNITED STATES OF AMERICA, *ss:*

To Union Sewer Pipe Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Thomas Connolly is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsaat, this 28th day of March, in the year of our Lord one thousand nine hundred.

KOHLSAAT,
*District Judge.*

733 On this 13th day of April, in the year of our Lord one thousand nine hundred, personally appeared before me, the subscriber, Thomas B. Lantry, and makes oath that he delivered a true copy of the within citation to Edwin Walker, the attorney for Union Sewer Pipe Company, defendant in error in the within citation, on the 13th day of April, A. D. 1900, at Chicago, Ill.

THOMAS B. LANTRY.

Sworn to and subscribed the 13th day of April, A. D. 1900.

[Seal of John M. Morrissey, Notary Public, Cook Co., Ills.]

JOHN M. MORRISSEY,
*Notary Public.*

Filed Apr. 13, 1900.

S. W. BURNHAM, *Clerk.*

Due, timely, and personal service of the within citation accepted this — day of ——, A. D. 1900.

——— ———,
*Attorney for Union Sewer Pipe Company, Defendant in Error.*

734 UNITED STATES OF AMERICA, *ss:*

To Union Sewer Pipe Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein William E. Dee is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsaat this 28th day of March, in the year of our Lord one thousand nine hundred.

KOHLSAAT,
*District Judge.*

735 On this 13th day of April, in the year of our Lord one thousand nine hundred, personally appeared before me, the subscriber, Thomas B. Lantry, and makes oath that he delivered a true copy of the within citation this day to Edwin Walker, the attorney for Union Sewer Pipe Company, the defendant in error, at Chicago, Illinois.

THOMAS B. LANTRY.

Sworn to and subscribed the 13th day of April, A. D. 1900.

[Seal of John M. Morrissey, Notary Public, Cook Co., Ills.]

JOHN M. MORRISSEY,
*Notary Public.*

Due, timely, and personal service of the within citation accepted this — day of ——, A. D. 1900.

——— ———,
*Attorneys for Union Sewer Pipe Co., Defendant in Error.*

Filed April 13, 1900.

S. W. BURNHAM, *Clerk.*

736 UNITED STATES OF AMERICA, *ss:*

In the United States Supreme Court.

*Writ of Error from the Circuit Court of the United States in and for the Northern District of Illinois.*

THOMAS CONNOLLY, Plaintiff in Error,
*vs.*
UNION SEWER PIPE COMPANY, Defendant in Error.

WILLIAM E. DEE, Plaintiff in Error,
*vs.*
UNION SEWER PIPE COMPANY, Defendant in Error.

No. 615. October Term, 1899.

To Edwin Walker, Esq., and Herbert W. Hamlin, Esq., attorneys for defendant in error:

You are hereby notified that on the 23d day of April, A. D. 1900, we have filed with the clerk of the Supreme Court of the United States a statement of the errors upon which the plaintiffs in error in the above-entitled causes intend to rely and of the parts of the record which the said plaintiffs in error and each of them think necessary for the consideration thereof, and have designated such parts only to be printed by the clerk of the said Supreme Court of the United States, as will more fully and particularly appear from a copy of the said statement and designation hereto attached.

HENRY D. COGHLAN,
JOHN REID McFEE, AND
THOS. B. LANTRY,
*Attorneys for Plaintiffs in Error.*

Received a copy of the foregoing notice, with statement and designation attached, this 2nd day of May, A. D. 1900.

EDWIN WALKER,
HERBERT HAMLIN.

737 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

*Writ of Error from the Circuit Court of the United States in and for the Northern District of Illinois.*

THOMAS CONNOLLY, Plaintiff in Error,
*vs.*
UNION SEWER PIPE COMPANY, Defendant in Error.
Gen. No., 615.
October Term, 1899.

WILLIAM E. DEE, Plaintiff in Error,
*vs.*
UNION SEWER PIPE COMPANY, Defendant in Error.
Gen. No., 615.
October Term, 1899.

Come now Thomas Connolly and William E. Dee, plaintiffs in error in the above-entitled cause as consolidated, and state that they intend to rely upon all of the errors specifically set out and enumerated in their assignments of error attached to the record in this cause, and being pages 685 to 721, both inclusive, in said record, and that they designate and state that the parts of the record which they and each of them think necessary for the consideration thereof are as follows, to wit:

1. All of the pleadings and all of the orders of the said circuit court in said cause, being pages 1 to 98, both inclusive, of the said original transcript of the record.

2. The evidence of J. W. Chapman and the stipulations of counsel made in open court on the trial of said cause, being pages 99 to
738 106, both inclusive, except the words "which statement are in the words and figures as follows," at the end of page 106.

3. The testimony of Horace B. Camp, included in pages 202 to 233, both inclusive, of the transcript of the record.

4. The form of contract between the Union Sewer Pipe Company and its several constituent companies, being the alleged trust contract, on pages 397 to 403, both inclusive, of the transcript of the record.

5. The motion of the attorney for the Union Sewer Pipe Company to exclude the depositions of Frank S. Monnett, Esq., attorney general of Ohio; the rulings of the court upon said motion, pages 431 to 434, both inclusive, of said transcript of record, except the last sentence on page 434, as follows, to wit: "The said depositions excluded by the court are in the words and figures following, to wit."

6. The certificate of Noah O. Foust, commissioner, attached to the depositions of Frank S. Monnett, on page 460 of the transcript of said record.

7. The testimony of Henry J. McNichols, on pages 479 to 486, both inclusive, of the transcript of said record.

8. The testimony of William E. Dee, pages 487 to 507, ending at

the words "I wrote," preceding the words "Mr. Walker: Wait a
Part omitted not important.
minute. Let's have the letters;" and the further testimony of William E. Dee, on pages 517 to 540, both inclusive, of the transcript of the said record.

9. The testimony of W. D. Kent, pages 541 to 545, both inclusive, of the transcript of said record.

10. The testimony of Thomas Connolly, on pages 560 to 585, ending at the words on page 585, "that I claimed coming to me," of the transcript of said record.

11. Motions for leave to file amendment, ruling thereupon, and the amendment offered to be filed, pages 592 to 601, both inclusive, of the transcript of said record.

739 12. The cross-examination of Byron W. Robinson, a witness on behalf of the Union Sewer Pipe Company, pages 631 to 635, both inclusive, of the transcript of said record.

13. The motion of Mr. Walker to charge the jury, pages 668 to 675, both inclusive, of the transcript of the record.

14. The opinion of the court instructing the jury to return a verdict for the defendant in error, pages 676 to 680, both inclusive, of the transcript of said record.

15. The objection of the plaintiff in error William E. Dee to a verdict against him on the ground that the jury was not sworn to try the issues between him and the defendant in error, and the ruling of the court thereupon, and the swearing of the jury to try such issues, pages 681 to 681½, both inclusive, of the transcript of said record.

16. The petition for writ of error, 683 to 684, both inclusive, of the transcript of said record.

17. Assignment of errors, pages 685 to 721, both inclusive, of the transcript of said record.

18. Order allowing writ of error, page 722.

19. Appeal bond of Thomas Connolly, pages 723 and 724.

20. Appeal bond of William E. Dee, pages 725 and 726.

21. Certificate of the clerk of the circuit court, page 727.

22. Writs of error and return of service thereon, pages *to* 728 to 73–.

And the said plaintiffs in error, Thomas Connolly and William E. Dee, jointly and severally, do hereby designate the said parts of the said record to be printed by the clerk and such parts only to be so printed, in accordance with the ninth section of rule 10 of the rules of the Supreme Court of the United States.

HENRY D. COG-LAN,
JOHN REID McFEE,
THOS. B. LANTRY,
*Attorneys for Plaintiffs in Error.*

740 [Endorsed:] No. 615. October term, 1899. Gen. No., —. Term No., —. United States Supreme Court of America. Thomas Connolly, plaintiff in error, *vs.* Union Sewer Pipe Company, defendant in error. William E. Dee, plaintiff in error, *vs.* Union

Sewer Pipe Company, defendant in error. Suggestions for printing. O'Donnell & Coghlan, John Reid McFee, Thomas B. Lantry, att'ys for pl'tffs in error, 805 "The Rookery," Chicago.

741 [Endorsed:] File No., 17729. Supreme Court U. S., October term, 1899. Term No., 615. Thomas Connolly *et al.*, P. E., *vs.* Union Sewer Pipe Co. Statement of errors & designation by P. E. of parts of record to be printed. Filed May 5, 1900.

742 UNITED STATES OF AMERICA, *ss:*

In the United States Supreme Court.

*Writ of Error from the Circuit Court of the United States in and for the Northern District of Illinois.*

THOMAS CONNOLLY, Plaintiff in Error,
*vs.*
UNION SEWER PIPE COMPANY, Defendant in Error.
WILLIAM E. DEE, Plaintiff in Error,
*vs.*
UNION SEWER PIPE COMPANY, Defendant in Error.
} No. 615.

The Union Sewer Pipe Company, defendant in error in the above-entitled consolidated cases, hereby designates additional parts of the record in said causes which it considers material on the hearing of the errors assigned by plaintiffs in error, to wit:

1. On page 106 the words "which statements are in words and figures as follows," and Plaintiffs' Exhibits 3 and 4, pages 107 and 108 of the transcript.

2. Admission of receipt of goods by counsel for Dee, with the value thereof, at the top of page 109, to the words "cross-examination" on said page.

3. Objection to the deposition of David E. Hill, commencing with the following words on page 110, to wit: "Mr. Walker: Before reading that," and the ruling of the court on such objection, with plaintiffs' exceptions thereto on page 111.

743 4. Pages 112 to 115, both inclusive, of the direct examination of David E. Hill.

On page 140, beginning with the words "Q. Shortly after the formation," etc., to middle of page 141, ending with words "said to any of them by me."

Cross-examination, pages 143 to middle of page 145, ending with words "thickness of depth of socket;" also pages 148 to 157, both inclusive.

Recross-examination, pages 177 and 179, and page 189.

5. Pages 234 to 238, both inclusive, of the deposition of the witness Horace B. Camp.

Pages 239 and 241.

6. Pages 272 to 282, both inclusive, of the deposition of Joseph A. Baldwin.

7. Pages 317 to 330, both inclusive, and the deposition of Harry Thompson.

8. Cross-examination of the witness Edwin N. Buhl, pages 348 and 349, and direct examination by the plaintiff of the same witness, page 350, to the words "cross-examination" on page 361.

Also pages 369 and 370, redirect examination.

9. Plaintiffs' objection to the reading of deposition of David E. Hill and exceptions on page 386.

10. Plaintiffs' objection to the deposition of Joseph A. Baldwin, the ruling of court, and exceptions on page 417.

744 11. Testimony of witness P. N. Finstlwait, pages 546 and 547, to the words "A. Well, it never was in the specifications since I was the sewer-pipe inspector."

12. Testimony of Byron W. Robinson, pages 606 to 618, both inclusive, and pages 621 to 630, both inclusive.

13. Testimony of F. W. Rockwell, beginning with page 640.

14. Testimony of William A. Humphreys, from page 646 to 654, both inclusive.

15. Testimony of T. M. Humphreys, pages 655 to 658, both inclusive, and pages 658 to 660, both inclusive, on cross-examination.

16. W. A. Humphreys recalled, pages 664 and 665.

17. Testimony of J. W. Chapman, recalled, pages 666, 667.

18. Order of court, page 681 down to and including the words "Verdict for plaintiff in these two sums."

EDWIN WALKER,
*Att'y for Defendant in Error.*

745 [Endorsed:] File No., 17,729. Supreme Court U. S., October term, 1900. Term No., 259. Thomas Connolly & Wm. E. Dee, P. E., *vs.* Union Sewer Pipe Co. Designation by defendant in error of additional parts of record to be printed. Filed July 5, 1900.

Endorsed on cover: File No., 17,729. N. Illinois C. C. U. S. Term No., 259. Thomas Connolly and William E. Dee, plaintiffs in error, *vs.* Union Sewer Pipe Company. Filed April 23d, 1900.

In the

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 359.

THOMAS CONNELLY AND WILLIAM E. DEE, *Plaintiffs in Error,*
vs.
UNION SEWER PIPE COMPANY, *Defendant in Error.*

In Error to the Circuit Court of the United States for the Northern District of Illinois.

# Brief and Argument of Plaintiffs in Error.


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CHAMPLIN & CHRISLER, 148 Lake Street, Chicago.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

## No. 259.

THOMAS CONNELLY AND WILLIAM E. DEE,
*Plaintiffs in Error,*
vs.
UNION SEWER PIPE COMPANY,
*Defendant in Error.*

In Error to the Circuit Court of the United States for the Northern District of Illinois

# Brief and Argument of Plaintiffs in Error.

## STATEMENT OF THE CASE.

### FORM OF ACTION.

Two suits in assumpsit brought by the Union Sewer Pipe Company, a corporation of Ohio, against Thomas Connelly and William E. Dee, citizens of the State of Illinois, to recover—from Thomas Connelly upon two promissory notes the sum of three thousand two hundred and fifty-eight dollars and sixty cents, and from William E. Dee—upon an open account, for goods sold and delivered, two thousand three hundred and eighty-nine dollars and twenty-six cents.

## Decision Based on the Pleadings.

Separate pleadings were filed by the defendant in error in the court below;—in the Thomas Connelly case, the ordinary declaration on notes payee *versus* maker, with affidavit of amount due;—in William E. Dee case the ordinary declaration in assumpsit, with common counts and affidavit of amount due.

To these pleadings the plaintiffs in error filed separate pleas of the general issue, with affidavits of merits attached, also notices of special defenses under the Practice Act of the State of Illinois, also notices and claims of set-off against defendant in error, supported by bills of particulars of the nature and amount of the set-offs claimed.

The defenses were based upon the theory that the defendant in error was a pool, trust and combination organized for the express purpose of creating and carrying out restrictions in trade and commerce contrary—

1. To the common law in force both in Ohio and Illinois.

2. To the Act of Congress of July 2, 1890, commonly called the "Sherman Act," and

3. To the statutes of the State of Illinois, being an act to define trusts and conspiracies against trade and declaring contracts in violation thereof void, approved June 20th, in force July 1, 1893.

The notices of set-offs and bills of particulars accompanying same set up; that the defendant in error, by reason of being a trust as aforesaid, damaged the plaintiffs in error, and each of them, and they were entitled to recover—

1. Treble the amount of the actual damages sustained

by them and each of them, allowed by Act of Congress of date June 2, 1890, commonly known as the "Sherman Act."

2. Actual damages sustained by the plaintiffs in error and each of them, by reason of the defendant in error's violation of an Act of the Legislature of the State of Illinois entitled "An Act to define trusts and conspiracies, etc., in force July 1, 1893.

3. Also special damages suffered.

Under each of these notices are itemized statements of the actual damages suffered by plaintiffs in error, by reason of the formation of defendant in error, and its operation as a trust, etc., which damages are made up of an overcharge of 5 per cent. the plaintiffs in error were compelled to pay on all pipe shipped to them while the defendant in error continued to operate as a trust, and actual damages for the violation of an express contract assumed by the defendants in error, whereby Thomas Connelly was actually compelled to pay and did pay out in excess of contract, to the defendant in error the sum of $5,600, and William E. Dee under the same circumstances was actually compelled to pay and did pay out the sum of $8,624.

## Notices of Special Defenses and Set-offs—the Controlling Feature of the Case.

The *gravamen* of the notices is that ten corporations, nine of which were organized under the laws of the State of Ohio, located in Summit county, in the State of Ohio, within a limited district of said county, known as the "Akron district," all being engaged in the manufacture of a commodity known as standard Akron sewer pipe, which name

is a trade name or designation known and understood in the trade to mean only such pipe as is manufactured in the Akron district, the said ten being all of the manufacturers engaged in the manufacture of said standard Akron sewer pipe, entered into a conspiracy and scheme for the formation of a pool, trust and combine, directly and expressly contrary to and prohibited by the Illinois statutes, referred to in the notices, and also the Federal statute, and the common law, the same being criminal under the said statutes, and under the common law; the intent and purpose of said parties being fully and in detail alleged in the notices, and the parties composing the same, and shown to be in express and direct violation of every line and word of the said statutes and of the common law. That the creature born of this conspiracy and scheme was known as the Union Sewer Pipe Company, the defendant in error herein. That the purpose of the creation of the said Union Sewer Pipe Company was to operate it as a pool to purchase and control the sewer pipe manufacturing business of the "Akron district," manufacturing Standard Akron sewer pipe, and thereby to absolutely monopolize and control and fix and regulate the manufacture and supply and sale of standard Akron sewer pipe, and the prices at which the material was to be purchased and the manufactured product sold, etc., and carry out restrictions in trade, limiting the production, increasing the market price, etc., in the manufacture and sale of sewer pipe. That all the claims in this case arise wholly out of and are in respect of sales of said articles of merchandise in the ordinary course of its business as such a trust or combination, and this action is to recover the alleged price thereof.

## Consolidation of the Cases for Trial.

Inasmuch as both cases of the plaintiff in error were precisely alike, except in the amounts involved, and the pleadings involved the same issue, by agreement of all parties it was ordered by the court that the two cases be submitted to the same jury; that they return separate verdicts, and that the same evidence may be used as a bill of exceptions in each case, or in both. The cases were so tried, and the testimony in one applied to the other, and the cases were treated as consolidated.

## Jurisdiction of the Supreme Court and the Principal Question for its Consideration.

The court below struck out all the notices of set-off of plaintiffs in error, and struck out notices of special defenses relating to the common law in Ohio and Illinois, and to the Act of Congress of July 2, 1900, called the "Sherman Act." The third notice of special defense, viz: The statutes of the State of Illinois "defining trusts and conspiracies against trade, and declaring contracts in violation of same void," *was held to be good if the statute was constitutional.* But it was, in the opinion of the learned Judge, contrary to the 14th Amendment to the Constitution of the United States, because it denied to citizens the equal protection of the laws, and violative of ART. IV, SEC. 22 of the Constitution of Illinois, which forbids class legislation. The jury was accordingly instructed to find verdicts for the plaintiff in the court below.

Therefore, the paramount question for the consideration of this Honorable court is the constitutionality of an Act

passed by the General Assembly of the State of Illinois, entitled "An Act to provide for the punishment of persons, co-partnerships or corporations forming pools, trusts and combinations, and modes of procedure and rules of evidence in such cases." The Act was passed in 1891, and Section 1 of said Act, in substance, provided that if a corporation, partnership, individual or other association of persons should create or enter into and be a member of or a party to any pool, trust, agreement, combination, etc., "with any other corporation, partnership, individual, or any other person or association of persons to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this Act."

Section 6 of said Act provided "any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provisions of the preceding sections of this act *shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment.*"

In 1893, on the 20th of June, a law was approved amending the Act of 1891, by adding to it two sections, one known as Section 7a and the other as Section 7b (Rec., p. 716; Trans., p. 251,) which sections are not involved in this discussion.

On the same day that the amendment to the Act of 1891, was passed, to-wit, the 20th of June, 1893, the Legislature passed an act entitled "An act to define trusts and conspiracies against trade," declaring contracts in violation of the provisions of this act, and making certain acts in violation thereof misdemeanors, and prescribing the punishment therefor, etc.

In the foregoing act, passed on the 20th of June, 1893, was a section upon *which the law was declared unconstitutional, and upon which the decision appealed from in this case is based*, which section is known as Section 9, and reads as follows:

> "*The provisions of this act shall not apply to agricultural products or live-stock while in the hands of the producer or raiser.*"

The Legislature again in 1897, amended the Act of 1891, treating in both amendments the Act of 1891, as being in full force and effect, which amendment is immaterial for the purpose of this case.

The plaintiffs in error pleaded Section 6 of the Act of 1891, re-enacted in Section 10 of the law of 1893, *which gives the right to any purchaser from any corporation, etc., transacting business contrary to the provisions of the said law to plead the act as a defense to any suit for such price or payment.* (For law see Rec., p. 715; Trans., pp. 250–251. For pleas see Rec., pp. 58–70; Trans., pp. 33 to 41.)

## A Specification of the Errors Relied Upon.

### I.

That the said court erred in striking out the notice of set-off contained in the notice of special defenses and set-off attached to the plea in said cause; which notice of set-

off was the same in each case (except in figures) and in the words and figures following, to-wit:

Take further notice that on the trial of this cause the defendant will give in evidence and insist that the plaintiff was before and at the time of the commencement of this suit and still is indebted to the defendant in the sum of seventy-six thousand and five hundred and twenty dollars, for that the plaintiff is and ever since the 1st day of January, 1893, was a combination in the form of a trust in restraint of trade and commerce between the State of Illinois and Ohio and between other States within the United States, and that by reason of the plaintiff being such a combination and as the direct, inevitable and proximate result thereof, the defendant has been injured in his business by reason of acts and things done by the plaintiff and forbidden and declared to be unlawful by an act of Congress of date June 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," to-wit, the selling by the plaintiff while residing and carrying on business in the State of Ohio at divers times between the 25th day of February, 1893, and the 30th day of June, 1896, of divers goods and merchandise, to-wit, sewer and drainage pipes, to the defendant while residing and carrying on business in the State of Ohio, which goods and merchandise the defendant was by force of circumstances beyond the reasonable control of the defendant and wrongfully and designedly brought about solely by the plaintiff with intent to coerce the defendant into purchasing said goods and merchandise compelled to obtain from and purchase of the plaintiff at prices largely in excess of the true and real market price thereof—that is to say, the defendant was compelled, as afore-

said, to pay and did pay to the plaintiff for said sewer and drainage pipes shipped between said dates by the plaintiff from the State of Ohio to the defendant in the State of Illinois the sum of $23,840 over and in excess of the true and real market value thereof, whereby the defendant lost and was actually damaged in his business of a sewer contractor in the sum of $23,840; wherefore the defendant now claims, under and by virtue of the provisions of said act of Congress, by way of set-off against the plaintiff in this action, the said sum of $76,520, being three times the amount of his said total loss and damage, together with reasonable attorneys' fee, to-wit, $5,000 and his costs of suit.

And take further notice that the defendant will also give in evidence and insist that the plaintiff was, and at the time of the commencement of this suit and still is, indebted to the defendant in the sum of twenty-three thousand eight hundred and forty dollars ($23,840), damages sustained by the defendant by reason of the plaintiff's becoming and since the 1st day of January, 1893, continuing to be and trade as a trust or combination of persons and corporations doing business in the States of Ohio and Illinois and between said States, organized for the express purpose of unlawfully and contrary to the provisions of an act of the Legislature of the State of Illinois entitled "An Act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void and making certain acts and violations thereof misdemeanors and prescribing punishment thereof and matters connected therewith, approved June 30, 1893, in force July 1, 1893," and that by reason of the plaintiff being and doing business as such a trust or combination, as aforesaid, the defendant

was by force of circumstances beyond his reasonable control, and which existed and were wrongfully and designedly brought about by the plaintiff with intent to coerce *of* the defendant into *to* purchasing only from the plaintiff, compelled to obtain from and did obtain from the plaintiff between the 25th day of February, 1893, and the 30th day of June, 1896, large quantities of certain merchandise, to-wit, sewer and drainage pipes, and was compelled and did pay therefor the sum of $126,940, which amount was largely in excess of the true and real market value thereof, to-wit, the sum of $103,100.

And take further notice that the defendant will give in evidence and insist that the plaintiff was, and before and at the time of the commencement of this suit and still is, indebted to the defendant in the sum of twenty-three thousand eight hundred and forty dollars ($23,840), damages sustained by the defendant by reason of the plaintiff's becoming and since the 1st day of January, 1893, continuing to be and trade as a trust or combination of persons and corporations doing business in the States of Ohio and Illinois and between said States, organized for the express purpose of unlawfully and contrary to the provisions of an act of the Legislature of the State of Illinois entitled "An Act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void, and making certain acts and violations thereof misdemeanors, and prescribing punishment thereof and matters connected therewith, approved June 30, 1893, in force July 1, 1893," and that by reason of the plaintiff being and doing business as such a trust or combination, as aforesaid, the defendant was, by force of circumstances beyond his reasonable control and which existed and were wrong-

fully and designedly brought about by the plaintiff with intent to coerce the defendant into purchasing only from the plaintiff, and was compelled to obtain from and did obtain from the plaintiff between the 25th day of February, 1893, and the 30th day of June, 1896, large quantities of certain merchandise, to-wit, sewer and drainage pipes, and was compelled to pay and did pay therefor the sum of $126,940, which amount was largely in excess of the true and real market value thereof, to-wit, the sum of $103,100.

And take further notice that the defendant will give in evidence and insist that the plaintiff was and before and at the time of the commencement of this suit and still is indebted to the defendant in the sum of twenty-three thousand eight hundred and forty dollars, money had and received by the plaintiff to the use of the defendant, in that the plaintiff became on or about the 1st day of January, 1893, and has ever since continued to be and operate as a trust or combination of persons and corporations doing business in the State of Ohio and between said State and the State of Illinois, and organized and existing for the express and sole purpose of unlawfully controlling and regulating, in restraint of trade and contrary to the common law, the market prices of certain articles of commerce, to-wit, sewer and drainage pipes; that the defendant was compelled, wholly by reason of the existence of such a trust or combination and of the pressure of circumstances beyond reasonable control of the defendant, and wrongfully and designedly brought about by the plaintiff with intent to coerce the defendant into purchasing only of the plaintiff, to purchase and did purchase from the plaintiff, acting and doing business as such a trust or combination, at various dates between the 25th day of February, 1893, and

the 30th day of June, 1896, large quantities of said articles of commerce of the true and real market value of $103,100, and no more, at the unreasonable, exorbitant, fictitious and compulsory price of $125,940.

And on the trial of this action the defendant will set-off and allow to the plaintiff, against any true and lawful demand on its part to be proved on such trial, so much of the said sums of money so due from the plaintiff to the defendant, as aforesaid, as will be sufficient to satisfy and discharge such demand.

And you will further take notice that at the trial of said cause the defendant will give in evidence and insist that all and singular the matters and defenses hereinbefore specially given notice of arose out of sales of goods, wares and merchandise made by the plaintiff to the defendant, the prices of which are sought to be recovered in this action, and that such sales were made in furtherance of and connected with the unlawful combination in the nature of a trust, as aforesaid, and that the prices charged for the said goods, wares and merchandise so sold and the prices of other goods, wares and merchandise sold and delivered by the plaintiff to the defendant and paid for by him were unreasonable and produced by the unlawful combination in the nature of a trust aforesaid, and that this defendant does set-off the amount of such unreasonable prices so produced in excess of the actual value and reasonable prices at the time of such sales as damage to the plaintiff's demand in this action, and will ask judgment against the plaintiff for such excess; and

You will take further notice that the defendant will do all this in connection with all and singular the other mat-

ters of set-off of which you have heretofore been given notice.

And the court so erred for the following reasons, to-wit:

(*a*) The facts set out in the said special notice of set-off were proper defenses under the general law of the State of Illinois and the general law of the United States and the general law of the State of Ohio.

(*b*) The facts set out in said special notice of set-off were proper defenses under the act of the General Assembly of the State of Illinois, being an Act to define trusts and conspiracies against trade, declaring contract in violation of the provisions of this act void, and making certain acts in violation thereof misdemeanors, prescribing punishment therefor and the matters connected therewith, approved June 20th, in force July 1, 1893, the said act being amendatory and supplemental to an act of the General Assembly entitled "An Act to provide for the punishment of persons, co-partners, or corporations forming pools, trusts, and combinations, and modes of procedure and rules of evidence in such cases," approved June 11, 1891; in force July 1, 1891.

(*c*) The facts set out in said special notices of set-off were proper defenses under the act of Congress of the United States of America entitled "An act to protect trade and commerce against unlawful restraint and monopolies," approved July 2, 1890, and commonly known as the "Sherman *anti*-trust act."

(*d*) The damages set out in the said special notices of set-off were proper damages allowable and recoverable under the act of Congress aforesaid, and under the bill of particulars filed in said cause in the words and figures following, to-wit;

Bill of particulars of set-off of William E. Dee:

*First Set-off.*

Treble the amount of the actual damages sustained allowed by act of Congress of date June 2, 1890, to-wit:

| | |
|---|---|
| Overcharge of 5 per cent. on 664 cars of ring pipe and fittings paid for by defendant between February 24, 1893, and June 30, 1896, at the average price of about $500.00 per car, $16,100.00 | $48,300.00 |
| Overcharge of 2½ per cent. on 512 cars of socket pipe paid for by defendant between February 24, 1893, and June 30, 1896, at the average rate of about $600.00 per car, $7,680.00 | 23,040.00 |
| Reasonable attorneys' fees allowed by said act | 5,000.00 |
| | $76,340.00 |

*Second Set-off.*

| | |
|---|---|
| Actual damages sustained by the defendant by reason of plaintiff's violation of an act of the Legislature of the State of Illinois, entitled "An act to define trusts and conspiracies, etc., in force July 1, 1893," as above set forth, of 5 per cent. more than market value of 644 cars of ring pipe and fittings at average price of about $500.00 per car | $16,100.00 |
| Of 2½ per cent. more than market value of 512 cars of socket pipe at average price of about $600.00 per car | 7,680.00 |
| | $23,780.00 |

*Third Set-off.*

| | |
|---|---|
| To money had and received by plaintiff of defendant contrary to law, viz., 5 per cent. of $322,000.00 | $16,100.00 |
| 2½ per cent. of $307,200.00 | 7,680.00 |
| | $23,780.00 |

Bill of particulars of set-off of Thomas Connelly:

*First Set-off.*

Treble the amount of the actual damages sustained, allowed by act of Congress of date June 2nd, 1890, to-wit:

| | |
|---|---|
| Overcharge of 5 per cent. on 255 cars of ring pipe and fittings paid for by defendant between February 24th, 1893, and June 30th, 1896, at the average price of about $550 per car, $139,841.46—$6,992.07 | $20,976.21 |
| Overcharge of 2½ per cent. on 688 cars of socket pipe paid for by defendant between February 24th, 1893, and June 30th, 1896, at the average rate of about $600 per car, $10,331.41 | 30,994.23 |
| Amount paid, $413,256.76. | |
| Reasonable attorneys' fees allowed by said act | 5,000.00 |
| | $56,970.44 |

*Second Set-off.*

Actual damages sustained by the defendant by reason of plaintiff's violation of an act of the Legislature of the State of Illinois, entitled "An act to define trusts and conspiracies, etc., in force July 1st, 1893," as above set forth, of 5 per cent. more than market value, of about 255 cars of ring pipe and fittings at an average price of about $550 per car, for which defendant paid the plaintiff $139,841.46, and of 2½ per cent. more than market value of 688 cars of socket pipe at an average price of $600 per car, on which defendant paid to the plaintiff the sum of $413,256.76:

| | |
|---|---|
| Damages on ring pipe and fittings | $ 6,992.07 |
| Damages on socket pipe | 10,331.41 |
| | $17,323.48 |

*Third Set-off.*

To money had and received by plaintiff of defendant contrary to law, viz:

| | |
|---|---|
| 5 per cent. of $139,841.46..... | $6,992.07 |
| 2½ per cent. of $413,256.76..... | 10,331.41 |
| | $17,323.48 |

On motion of defendant in error, before the trial the court struck these notices from the files. (Trans., p. 18; Rec., p. 36.)

II.

The court erred in ruling, on the 24th day of January, A. D., 1900, during the progress of the trial of said cause, as follows: After full and extended argument and the citation of authorities by counsel for all parties in interest upon the foregoing questions, the court denied the motion to strike out the special matters of defense set up in the notices filed by defendants and allowed the motion to strike out the motion for claim of set-off; to which ruling of the court defendants, by their counsel, then and there duly excepted.

This relates to the striking out of notices of set-off set out in the first assignment of error; plaintiffs in error were not permitted to introduce evidence on the trial in the court below in support thereof, which evidence would go to sustain the allegations in notices, and the damages set out in bills of particulars filed. (Trans., p. 18; Rec., p. 36.)

III.

The court erred in its ruling in the trial of said cause, on the 24th day of January, A. D. 1900, in sustaining the ob-

jection of the plaintiff to the motion of the defendants to file amendments to the notice of special defenses attached to the plea of general issue in said cause in the words and figures following, to-wit:

*Notice of Special Defenses.*

To The Union Sewer Pipe Company, plaintiffs in the above entitled cause, and to Edwin Walker, Esq., and Herbert W. Hamlin, attorneys for said plaintiff:

Take notice that upon the trial of this cause the defendant will, in defense thereto, introduce in evidence and rely upon the special facts and matters hereinafter stated—that is to say:

*First*, That heretofore, to-wit, a long period prior to the first day of January, A. D. 1893, the defendant was engaged in the business of a dealer and contractor in sewer and drainage pipe in the city of Chicago; that one of the principal features of the business of the defendant was to furnish and supply a quantity of sewer pipe for use by the city of Chicago and to furnish and supply sewer pipe for use by contractors with the city of Chicago for the construction and building of main sewers; that prior and up to the first day of January, A. D. 1893, the said defendant, William E. Dee, and his predecessor in business, William M. Dee, father of the said defendant, were engaged in said business; that prior to the first day of January, A. D. 1893, and for a period of at least five years theretofore and for a period of about five years thereafter the specifications issued by the city of Chicago for the construction of sewers provided that Akron sewer pipe should be used; that at such periods the commodity known as Akron sewer pipe had a trade designation and meaning and was universally understood to

mean only such sewer pipe as was manufactured in Summit county, in the State of Ohio, and within a limited district of said county, known as the Akron district, and that prior to the first day of January, A. D. 1893, the said sewer pipe was manufactured exclusively by the following firms and corporations, to-wit: Buckeye Sewer Pipe Company, the Summit Sewer Pipe Company, the National Sewer Pipe Company, the Akron Sewer Pipe Company, the Hill Sewer Pipe Company, Robinson Bros. Company, the Crown Sewer Pipe Company, the Camp & Thompson Sewer Pipe Company, the Sperry Sewer Pipe Company, and the Pennsylvania Sewer Pipe Company; that on or about the first day of January, A. D. 1893, all of the said Companies enumerated, confederated and combined together unlawfully and contrary to the common law and the general law and statutes of the State of Illinois and of Ohio, and contrary to the general law of the United States of America and of the law of the different States thereof and contrary to the statutes of the United States of America, for the purpose of limiting the production of sewer pipe known as Akron sewer pipe of the different articles of merchandise manufactured and produced by the said firms and corporations, and for the purpose of increasing the market prices thereof, and for the purpose of preventing competition in the manufacturing, making, transportation, sale or purchase of said articles of commerce, and for the purpose of fixing standards of figures whereby the prices of said sewer pipe and articles of merchandise intended for sale, use, and consumption in the State of Ohio and in the State of Illinois and throughout the United States should be controlled and established; that on or about the first day of January, A. D. 1893, the said firms and corporations hereinbefore particu-

larly named entered into a contract with the corporation known as The Union Sewer Pipe Company, the plaintiffs in this action, whereby they and each of them undertook and agreed to sell all the products of the factories of each of them through the medium of the said Union Sewer Pipe Company; that the said Union Sewer Pipe Company, under and by virtue of such agreement, notified the said defendant that any and all sewer pipe or other merchandise theretofore manufactured by any of the said firms or corporations and to be manufactured by any of the said firms and corporations could be purchased only from the said Union Sewer Pipe Company; that by reason of the said combination and by reason of the contract between the said Union Sewer Pipe Company and all of the said firms and corporations the said firms and corporations hereinbefore mentioned undertook and agreed to sell its products only to such persons as were named and designated by the said Union Sewer Pipe Company, and to fulfill only such contracts as were made approved, or accepted by the said Union Sewer Pipe Company; that after said combination the said Union Sewer Pipe Company alone controlled the entire manufactured product and output of all of the said firms and corporations, and it was impossible for this defendant or any other person or persons whomsoever to purchase any of the commodity known as Akron sewer pipe from the individual manufacturers or in any method other than through the medium of the said Union Sewer Pipe Company; that after the said Union Sewer Pipe Company in this manner entered into the business aforesaid the price of Akron sewer pipe was raised beyond the reasonable and ordinary price thereof and beyond the prices theretofore prevailing, and an excessive charge for

the Akron sewer pipe was thereafter made to this defendant and to others dealing in and requiring said Akron sewer pipe for the purpose of their business and over and above the fair market value thereof; that at the time of the contracts and agreements between the said Union Sewer Pipe Company and the firms and corporations aforesaid the said defendant was obligated to furnish large quantities of Akron sewer pipe to his customers and to sewer contractors within the city of Chicago; that the said defendant could not obtain any substitute for the said Akron sewer pipe and no substitute for the same existed, and that after the said Union Sewer Pipe Company began the transaction of business it notified this defendant that he must pay the increased price demanded and prices unreasonable and in excess of the market value of the said sewer pipe and in excess of the price prevailing prior thereto, or that said sewer pipe would not be furnished or supplied; that the defendant thereupon, by force of circumstances beyond his reasonable control and wrongfully and designedly and intentionally brought about solely by the plaintiff, was compelled to obtain the said merchandise and to pay for the same or to agree to pay for the same prices largely in excess of the true and real market price thereof, such prices being caused by reason of the said contracts and agreements; that at the time of the said contracts and agreements between the said Union Sewer Pipe Company and the firms and corporations aforesaid this defendant was a party to a contract between him and the firm of Camp & Thompson, one of the firms entering into said agreement and contract with the said Union Sewer Pipe Company, whereby the said Camp & Thompson agreed to furnish and supply to this defendant three hundred and

eight (308) carloads of the said Akron sewer pipe for the supply of the customers of the said defendant in the said city of Chicago; that the said Camp & Thompson agreed to deliver the said three hundred and eight (308) carloads in various installments and for the purpose of carrying out specific orders and contracts requiring the said aggregate amount of three hundred and eight (308) carloads between the said contracts being entered into by the said defendant and the various contractors within the city of Chicago, and that the requirements and needs of this defendant of the said three hundred and eight (308) carloads for such purpose *was* known to the said Camp & Thompson and to the said plaintiff; that prior to the said contracts and agreements between the said plaintiff and the said firms and corporations the said Camp & Thompson had made partial shipments under the said agreement to supply the said three hundred and eight (308) carloads of Akron sewer pipe to the said defendant; that after the said agreement and contract between the said plaintiff and the said firms and corporations the said plaintiff, The Union Sewer Pipe Company, acquired all of the rights of the said Camp & Thompson in and to the said contract, and assumed and agreed to perform all of the obligations of the said Camp & Thompson thereunder; that the price at which the said three hundred and eight (308) carloads were to be delivered to this defendant was at the rate of eighty per cent. (80%) discount from the western list price, and that this sum equalled the amount of one hundred and twenty dollars ($120) a carload; that the said price of one hundred and twenty dollars ($120) for an average carload of said Akron sewer pipe was the prevailing market price thereof and was the fair and reasonable value thereof; that as soon as

the Union Sewer Pipe Company made deliveries to this defendant of portions of the said three hundred and eight (308) carloads it demanded that this defendant pay an amount equal to seventy-five (75) per cent. discount from the said western list price, and aggregating an increased price of thirty dollars ($30) for each of the said three hundred and eight (308) carloads of said Akron sewer pipe remaining to be delivered; that this defendant, by force of circumstances beyond his reasonable control, and wrongfully and designedly brought about solely by this plaintiff, was compelled to obtain the said sewer pipe and purchase the same at such prices which were largely in excess of the real market value thereof, and were purchased by reason of the contract between the said Union Sewer Pipe Company and the said firms and corporations, and that this defendant does set-off the amount of said increased price on the said three hundred and eight (308) carloads and on other sewer pipe which this defendant was so forced to purchase for the exigencies of his contracts in the city of Chicago as against the plaintiff's demand in this action, and does demand judgment for the amount thereof, as particularly set out in the bill of particulars filed by this defendant in this cause.

And you will further take notice that this defendant will urge all the said defences and will ask for all of the said set-offs in connection with all and singular the other matters and defenses of which you have heretofore been notified, and that this defendant does urge all of the said special matters herein stated in additional and in amendment to all and singular the other matters and things contained in the notice of special defenses and set-offs filed in this cause.

You will further take notice that at the trial of said cause the defendant William E. Dee, will give in evidence and insist that heretofore, to-wit, on, to-wit, the 15th day of January, A. D. 1893, he entered into a contract with a certain firm known as Camp & Thompson, manufacturers of pipe known as Akron pipe with its principal plant and office in Cuyhoga Falls, in the State of Ohio, by the terms where of the said Camp & Thompson agreed to deliver during the year 1893, 308 carloads of pipe known and designated as city pipe at and for a price equal to eighty per cent. discount from the list price of such pipe; that such contract was in existence and shipments thereunder were made at the time of the formation of the corporation known as the Union Sewer Pipe Company; that on the organization of the said Union Sewer Pipe Company and the beginning of the business by the said Union Sewer Pipe Company, the Union Sewer Pipe Company assumed and agreed to perform the said contract; that after assuming and agreeing to perform the said contract the said Union Sewer Pipe Company made shipments thereunder, but failed and refused to accept the price of eighty per centum from the list price aforesaid, but demanded seventy-five per centum therefrom; that the defendant ordered said pipe for the purpose of fulfilling contracts made in the city of Chicago for the building of sewers, and that he was under the necessity of delivering such pipe and not pipe of any other quality or standard, in order faithfully to carry out the provisions of such contracts; that by reason thereof the said defendant was duressed into paying a price for said pipe equal to seventy-five per cent. discount from the list price thereof in lieu of eighty per cent. discount from the said list price, and by reason thereof he suffered dam-

ages to the extent of five per cent. upon each carload delivered under the terms of said contract; and at the trial of said cause the said defendant will set-off the said amount of such differences between seventy-five per cent. and eighty per cent. of such list price for all of the carloads delivered under the contract aforesaid, and will ask judgment against the plaintiff for the excess of such amount over the amount in this action, if any.

(Signed) JNO. R. MCFEE and
O'DONNELL & COGHLAN,
*Attorneys for Defendant.*

And the court so erred in refusing to permit the said defendant to file the same amendments to the special defenses under their plea of general issue for the reason that the said amendments and each of them aver special matters of substantial defense under the general law and of the State of Ohio, and of the State of Illinois, and of the United States, and under the Act of Congress aforesaid approved July 2nd, A. D. 1890, *and under the Act of Congress aforesaid approved July 2nd, A. D. 1890*, and under the said Act of the General Assembly of the State of Illinois, hereinbefore set out in this assignment of errors, approved June 20th, in force July 1st, 1893, said Act being supplemental and amendatory to the said Act, hereinbefore particularly mentioned in this assignment of errors, approved June 11th, A. D. 1891, in force July 1st, A. D. 1891.

A similar notice was offered to be filed for Thomas Connelly alleging the same facts, but for 200 carloads of pipe, which the court also refused leave to file, and this assignment applies likewise to this.

IV.

The court erred in excluding the depositions of Frank S. Monnett, attorney-general of the State of Ohio, for the reasons that the said depositions on their face showed that they were taken and certified under the law of the land and the practice of said court, and the said depositions contained testimony relevant to the issues in this cause, as follows:

*a.* They showed an admission of the president and other officers of the Union Sewer Pipe Company as to the effect of the contract between the said Union Sewer Pipe Company and its constituent members.

*b.* It showed the opinion of an experienced lawyer as to the contents and effect of a formal pleading filed by the said Union Sewer Pipe Company in a collateral suit, wherein they set up as against the plaintiff in such suit the defense that the said Union Sewer Pipe Company was a trust and an unlawful combination, in violation of the law the State of Ohio and of the Act of Congress.

*c.* It contained proof of the general and common law of the State of Ohio as to the effect of the contract between the Union Sewer Pipe Company and its constituent members, to-wit, that the said contract was violative of said law and deprived the Union Sewer Pipe Company of a right to maintain an action in the courts of Ohio to recover on a contract made with it in the course of its business.

*d.* It contained proof that the organization known as the Union Sewer Pipe Company was a trust and an unlawful combination in restraint of trade, contrary to the law of Ohio.

*c.* It contained proof of a proceeding instituted under the law of Ohio before the attorney-general and the governor of said State on an application for a *quo warranto* proceeding against the said Union Sewer Pipe Company because of its being a trust and an unlawful combination in restraint of trade, contrary to the laws of the State of Ohio and the Act of Congress, known as the Sherman *anti*-trust Act, of July 2nd, A. D. 1890, and contained an admission at said trial and hearing by the officers of the said Union Sewer Pipe Company and its attorney at such hearing that the said Union Sewer Pipe Company was a trust and an unlawful combination in restraint of trade, contrary to the laws of said State and contrary to the said Act of Congress, known as the Sherman *anti*-trust Act, of July 2nd, A. D. 1890.

V.

The court erred in ruling and stricking out an amendment filed by the defendants on the 26th day of January, A. D. 1900, the said amendment being in words and figures the same as the notice of special defense and set-off hereinbefore set forth under the third assignment of error herein with the exception of the words "and does demand judgment for the amount thereof as particulary set out in the bill of particulars filed by this defendant in this cause," being the last two lines in the second last paragraph and the words in the second line of the last paragraph, "and will ask for all of the said set-off," being omitted therefrom. The court so erred because it had permitted the filing of said amendments on the 26th day of January, A. D. 1900, during the progress of said trial.

The court permitted this amendment to be filed, and

afterwards denied it and struck the amendments from the files.

VI.

The court erred in instructing the jury to find a verdict for the plaintiff, and in charging the jury as follows:

Plaintiff in this case brings suit to recover upon certain promissory notes given by defendant for balance due on purchases and deliveries of sewer pipe. Defendant pleads the general issue and gives notices thereunder of three special defenses, all of which are based upon the theory that plaintiff was a trust or combination organized for the express purpose of creating and carrying out restrictions in trade, contrary—

"1. To the common law in force both in Ohio and Illinois;

"2. To the Act of Congress of July 2, 1890, commonly called the Sherman Act, and

"3. To the Statutes of the State of Illinois taking effect on July 1, 1893.

As to the matters set out in the first notice of special defense, it is undoubtedly true that by the common law contracts which are themselves directly in restraint of trade may in a proceeding based thereon be declared void and unenforceable by the courts, but there is no case brought to the attention of the court in which it has been held that at common law a contract not in itself in restraint of trade is void because one of the parties thereto is a party to a contract which is in restraint of trade, and the one contract is indirectly based upon the other. The fact that one party to a contract is engaged in illegal acts will not at common law avail the other party as a defense to the enforcement

of a contract in itself legal. The first notice of special defense will therefore be stricken out.

It will be seen by an inspection of the so-called Sherman Act, and of the opinion of Justice PECKHAM in the Addystone Pipe and Steel Company case, decided by the United States Supreme Court on December 4, 1899, that the Act only covers contracts which are themselves directly in restraint of trade, and does not affect those which are "merely indirectly, remotely, incidentally or collaterally regulate to a greater or less degree interstate commerce among the States." It therefore follows that the second matter of special defense set up must be stricken out.

Now, coming to the ground of special defense set up in the third notice, to-wit, the Illinois statute which went into effect on July 1, 1893, this statute in terms provides that the defense herein set up may be maintained as a bar; and if the statute is valid, then plaintiff cannot recover in this case if it be, as averred by defendant, a corporation organized in restraint of trade and a trust under the definition contained in said statute. Plaintiff contends that the said statute is unconstitutional, (1) because it is obnoxious to Section 1 of the fourteenth amendment of the Federal Constitution, which reades in part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of laws."

And also (2) because it is in contravention of Section 22 of Article 4 of the Constitution of the State of Illinois, which reads in part as follows:

"In all other cases where a general law can be made applicable, no special law shall be enacted."

The said statute of July 1, 1893, after defining a trust and setting out the various penalties provided for violation of the Act, provides, in Section 9, that

"The provisions of this Act shall not apply to agricultural products or live-stock while in the hands of the producer or raiser."

Can it be claimed that under this clause (9) every person within the jurisdiction of the State of Illinois has equal protection of the laws? Is not this class legislation? Is it in accordance with Section 1 of the fourteenth amendment to the Federal Constitution that those who produce or raise agricultural products or live-stock shall be exempted from the provisions of the statute which by its terms are binding upon every other citizen or person within the State? I think clearly not. I am of the opinion that this statute contains both class and special legislation and is in contravention of both the Federal and State Constitutions and therefore void.

It is urged that, granting the unconstitutionality of said ninth clause, yet it may be declared void without affecting the validity of the remaining clauses of said Act. If this were so, then by declaring said clause void, the courts would make the Act binding upon those classes of persons within the State which the Legislature had specially exempted from its provisions. This would be judicial legislation of the most flagrant character. In my opinion the said clause nine taints the whole Act and renders it all void. Therefore, the special defense set up in the third notice must be stricken out.

It follows upon the record, as it is with the said three

matters of special defense stricken out, that a verdict must be given for the plaintiff for the face of the notes in suit and interest thereon from maturity at 5 per cent, and the jury will be so instructed.

The court so erred for the following reasons, to-wit:

*a.* At the close of the testimony in behalf of the defendant no motion was made to exclude said testimony and the defense supported thereby and to instruct the jury at such time to find and return a verdict for the plaintiff.

*b.* At the close of the testimony in rebuttal no motion was made on behalf of the plaintiff to exclude the testimony and to instruct the jury to find and return a verdict for the plaintiff,

*c.* At the close of the evidence in surrebuttal no motion was made to exclude the testimony and to instruct the jury to find and return a verdict for the plaintiff.

*d.* At the close of all the testimony in the case no motion was made on behalf of the plaintiff to exclude the testimony and to instrect the jury to find and return a verdict for the plaintiff.

*e.* The court in instructing the jury to find a verdict for the plaintiff erred in ruling that although the plaintiff was an unlawful combination, in restraint of trade, under the general and common law, both of the State of Ohio and of the State of Illinois, nevertheless such fact was not a defense to the action.

*f.* In ruling that no contract in this cause was sued upon which in itself was in restraint of trade, whereas a written contract between the plaintiff and the defendant Dee, in restraint of trade *of* and void under the common and general law, both of the State of Ohio and of the State

of Illinois, constituted the foundation of the plaintiff's cause of action; which contract was in the words and figures following, to-wit:

Memorandum of an agreement made and entered into this 20th day of August, A. D., 1895, between the Union Sewer Pipe Company, of the city of Akron, county of Summit and State of Ohio, party of the first part, and William E. Dee, of the city of Chicago, county of Cook, State of Illinois, party of the second part, witnesseth:

The party of the first part agrees to sell and deliver to the party of the second part sewer pipe, free on board cars, at its factories at the following discounts off the western price list, to-wit:

| | |
|---|---|
| First-class socket pipe, from 2" to 20" inclusive | 85 Per Ct. |
| 24" socket pipe | 80 " " |
| 6" and 9" ring pipe with rings | 85 " " |
| 10" and large ring pipe with rings | 75 " " |
| All sizes second-class socket pipe | 90 " " |
| All sizes second-class ring pipe and rings | 87½" " |
| All sizes second-class ring pipe without rings | 90 " " |
| Ring cull pipe with rings | 85 " " |
| Ring cull pipe without rings | 87½" " |

All shipments by said first party in any one money to be settled for by note or acceptance of the second party, payable at bank in Chicago in ninety days from the tenth (10th) of the month following the month in which shipments are made, or if preferred by said second party settlements may be made in cash by the tenth of the month following the month in which the shipment is made and for such cash settlement an additional discount of two per cent. (2 per cent.) on the net amount may be deducted from the bill, but in no case will the first party accept city or town warrants in settlement of said shipment.

In consideration of the foregoing agreement the party of the second part agrees to purchase and handle exclusively, the sewer pipe handled and sold by the first party except when the first party is unable to furnish the party of the second part, and to place with the first party all orders for sewer pipe that they, the second party, may make.

In consideration of receiving the entire trade for sewer pipe from party of the second part, it is agreed by party of the first part that a rebate of one per cent. (1 per cent.) of the gross sales be allowed said second party. Said rebate to be paid second party at the close of each year provided the terms of this agreement have been faithfully carried out.

It is further agreed between said first and second parties that said first party will supply the second party twenty-five car loads of socket pipe of sizes 2" to 20" inclusive at 87½ discount f. o. b. car works. The above rebate of one per cent. will not apply on the pipe sold at 87½ discount.

It is further agreed that said first party permits said second party to purchase twenty-five cars of sewer p pe from H. B. Camp, Greentown, Ohio, and twenty-five car loads of pipe from the Chicago Sewer Pipe Company, Brazil, Indiana, but no more, and said second party consents to allow said first party access to his books to determine when above pipe has been delivered.

The said second party further agrees to sell on and after September 1, '95, all sewer pipe purchased from the party of the first part free on board cars in car load lots, o' at their respective yards or places of business in the city of Chicago or in Cook county, at the following discounts from the Western price list, namely:

| | | |
|---|---|---|
| 6" and 9" ring pipe with rings and socket pipe up to and including 20," on yard | 70 | Per Ct. off list. |
| 24" socket pipe on yard | 60 | off list. |

By car load lots f. o. b. cars in Chicago:

| | | |
|---|---|---|
| 6" and 9" ring pipe and rings and socket pipe up to and including 20" | 75 | off list. |
| 24" socket pipe | 67½ | Per Ct. " |

In no case shall seconds or culls be shipped by first party for use within the corporate limits of the city of Chicago.

Upon receipt of satisfactory evidence of violation of the terms of this agreement by said second party it is agreed between the first and second parties that it remains optional with the first party to cancel this contract with the second party and the first party will refuse to sell pipe to said second party.

This contract may be terminated by either party giving the other thirty days' written notice of such desire.

In witness whereof, we have hereunto affixed our hands and seals on the day and date first above written.

THE UNION SEWER PIPE CO.

(Signed) WM. E. DEE.

B. W. ROBINSON, *Sec'y.*

In defendant Connelly's contract the name Thomas Connelly was inserted where the words William Dee are contained in the above.

*g.* Because the court erred in ruling and instructing the jury to find and return a verdict for the plaintiff against both of said defendants that the cause of action was not a contract in itself in restraint of trade, whereas the declaration in this cause sued under the common counts for goods

bargained and sold under and in pursuance of a contract in writing between both defendants and the plaintiff void as in restraint of trade under the common and general law, both of the State of Ohio and of the State of Illinois.

*h.* The court erred in instructing the jury to find and return a verdict for the plaintiff; ruled that the defense set up in the special notice of defense that the cause of action in this case was barred by the said Act of Congress of July 2nd, 1890, commonly known as the Sherman anti-trust act, was not a proper defense.

*i.* Because the court erred in instructing the jury to find and return a verdict for the plaintiff; expressly ruled that the Act of July 1st, 1893, of the Legislature of the State of Illinois, amendatory and supplemental to the said act of the General Assembly entitled "An act to provide for the punishment of persons, co-partners or corporations forming pools, trusts and combinations and modes of procedure and rules of evidence in such cases. Approved June 11th, A. D. 1891, in force July 1st, A. D. 1891," was unconstitutional and void and in conflict with the fourteenth amendment of the Constitution of the United States, whereas the said act is not violative of the Constitution of the United States or any amendment thereto; said act is in the words and figures following, to-wit:

ACT OF 1893.

SEC. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of two or more of them for either, any or all of the following purposes: First—to create or carry out restrictions in

trade. Second—to limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third—to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities. Fourth—to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established upon any article or commodity of merchandise, produce or manufacture intended for sale, use or consumption in this State; or to establish any pretended agency whereby the sale of any such article or commodity shall be covered up and made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor or manufacturer to control the wholesale or retail price of any such article or commodity after the title to such article or commodity *after the title to such article or commodity* shall have passed from such vendor or manufacturer. Fifth—to make or enter into, or examine or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or card or price-list, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of

any such article or commodity that its price might in any manner be affected.

SEC. 2. That any corporation holding a charter under the laws of this State which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

SEC. 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the attorney-general or prosecuting attorney, upon his own motion to institute suit or *quo warranto* proceedings, at any county in this State (in) which such corporation exist, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

SEC. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the attorney-general to enfore this provision by injunction or any other proper proceedings, in any county in which such foreign corportion does business, in the name of the State on his relation.

SEC. 5. Any violation of either or all of the provisions of Section 1 of this act shall be and is hereby declared to be a conspiracy against trade, and a misdemeanor; and any person who may be or may become engaged in any such conspiracy or take part therein or aid or advise in its commission, or who shall, as principal, manager, director agent, servant or employe, or in any other capacity knowingly carry out any of the stipulations, purposes, prices, rates, orders thereunder, or in pursuance thereof shall be punished by fine not less than two thousand dollars or more than five thousand dollars.

SEC. 6. In any indictment or information for any offense named in this act. It is sufficient to state the purposes and effect of a trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how or where it was created.

SEC. 7. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument or which it may have been based, or that it was evidenced by any written instrument at all.

SEC. 8. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforcible either in law or equity.

SEC. 9. The provisions of this act shall not apply to agricultural products or live-stock while in the hands of producer or raiser.

SEC. 10. Any purchaser of any article or commodity, from any person, firm, corporation or association of persons, or of two or more of them, transacting business contrary to any provision of the preceding sections of this act, shall not be liable for the price or payment of such article or commodity and may plead this act as a defense to any suit for such price or payment.

[NOTE.—Act of 1891, is set out in transcript of record, page 250. This decision is based upon Act of 1893, especially Sections 9 and 10 of said act. Act of 1891, is substantially the same so far as concerns this case, except it does not contain Section 9—the section upon which the

Act of 1893, was declared to be unconstitutional by court below.]

*j.* The court erred in instructing the jury to find and return a verdict for the plaintiff; ruled that the 9th clause of the said act of July 1, 1893, of the Legislature of the State of Illinois was in violation of the 14th amendment of the Constitution of the United States.

*k.* The court erred in instructing the jury to find and return a verdict for the plaintiff; ruled that because clause nine of the said Act of July 1, 1893, of the Legislature of the State of Illinois was unconstitutional under the 14th amendment to the Constitution of the United States the whole act was void, whereas the said ninth clause was not in violation of the said 14th amendment to said Constitution, and even if the same were in violation thereof the entire act would not, in consequence thereof, be void.

*l.* The court erred in instructing the jury to find and return a verdict for the plaintiff in not holding that if the said act of July 1, 1893, were unconstitutional and void, that thereupon the said Act of July 1, 1891, of which the said Act of July 1, 1893, was *an* amendatory and supplemental, would be revived, and that the defense set up in the special notice attached to the defendants' plea were admissible under the said Act of July 1, 1891.

**Notices of special defense stricken out, and notice held good, if law was constitutional:**

Take notice that upon the trial of this action the defendant will, in defense thereto, rely on the special matters hereinafter stated—that is to say:

*Firstly.* That the plaintiffs—and at all times since about the 1st day of January, 1893, has been a trust or combina-

tion of the capital, skill, and acts of divers persons and corporations carrying on a commercial business in the States of Ohio and Illinois and between said States and elsewhere in the United States of America, and organized for the express purpose of unlawfully and contrary to the common law creating and carrying out restrictions in trade, to-wit, in the trade of buying, selling and otherwise dealing in certain articles of merchandise, to-wit, sewer and drainage pipes; and also for the express purpose of unlawfully and contrary to the common law limiting the production of said articles of merchandise and increasing the market price thereof; and also for the express purpose of unlawfully and contrary to the common law preventing competition in the manufacturing, making, transportation, sale or purchase of said articles of commerce; also for the express purpose of unlawfully and contrary to the common law fixing standards or figures whereby the prices of said articles of merchandise intended for sale, use and consumption in this State should be controlled and established; and also for the express purpose of unlawfully and contrary to the common law being a pretended agency whereby the sale of said articles of commerce should and might be covered up and made to appear to be for the original vendors thereof, and so as to enable the original vendors or manufacturers thereof to control the wholesale and retail price of such articles of commerce after the title thereto had passed from such vendors or manufacturers; and for the further express purpose of unlawfully and contrary to the common law making and entering into and carrying out a certain contract or certain contracts by which the several persons or corporations forming the plaintiff or being the pretended stockholders thereof, to-wit, have bound themselves not to sell, dispose of, or transport said

articles of commerce below certain common standards, figures or card or list prices in excess of the true market values thereof, and by which they have agreed to keep the prices of said articles of commerce at certain fixed or graduated figures, and by which they have established certain settled prices of said articles of commerce between themselves and others so as to preclude a free and unrestricted combination among themselves and others in the sale and transportation of said articles of commerce, and by which they had agreed to pool, combine and unite any interest they may have in connection with the sale and transportation of said articles of commerce so that the prices thereof may effect advantageously to themselves; that all the claims of the plaintiff against the defendant in this action arise wholly out of and are in respect of sales of said articles of merchandise made between the 25th day of February, 1893, and the 30th day of June, 1896, to the defendant by the plaintiff in the ordinary course of its business as such a trust or combination, acting as aforesaid, and that this action is brought to recover the alleged price thereof and for no other purpose.

*Secondly.* That the plaintiff is and at all times since the 1st day of January, 1893, was a combination in the form of a trust in restraint of trade and commerce among the several States and doing business as such throughout the United States and between the States of Ohio and Illinois, contrary to the provisions of an Act of Congress of date July 2, 1890, and entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and that this action is brought solely to recover the price of articles of merchandise, to-wit, sewer and drainage pipes sold to the defendant by the plaintiff, then and there acting

and doing business as such a combination, as aforesaid, in violation of the provisions of said act.

*Thirdly.* That the plaintiff is and at all times since the 1st day of January, 1893, was a trust and doing business as such in the State of Illinois and elsewhere contrary to the provisions of an Act of the Legislature of the State of Illinois, entitled "An Act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void, and making certain acts and violations thereof misdemeanors and prescribing punishment thereof and matters connected therewith, approved June 20, 1893; in force July 1, 1893;" that this action is brought solely to recover the price of articles of merchandise, to-wit, sewer and drainage pipes sold to defendant by plaintiff, then and there acting and doing business in violation of the provisions of said act, and that the defendant hereby pleads said act in defense to this action and the whole thereof.

XII.

The court erred in excluding testimony in reference to contracts for 200 carloads of sewer pipe between Camp & Thompson and Thomas Connelly and for 308 carloads for W. E. Dee, entered into before the formation of the Union Sewer Pipe Co., and admitted by the plaintiff, that the contract was assumed by it after its organization, and that it started to carry out the said contract, but never fulfilled the same according to the terms, for which breach of contracts the said Thomas Connelly and William E. Dee should have been allowed to set-off damages against the Union Sewer Pipe Company for the additional 5 per cent. he was compelled to pay by reason of the Union Sewer Pipe Company assuming the contract and failing to carry it out, and billing

the cars to him at such advance price, which was part of the money sought to be recovered from him by plaintiff in the case.

## XIII.

The court erred in denying the right of defendants to read cross-examinntion of witness Harry Thompson, called on behalf of plaintiff, as their own witness, who testified to a contract made by him with Thomas Connelly and William E. Dee, defendants, for 200 and 308 carloads respectively, which contract was subsequently assumed by the Union Sewer Pipe Company, and carried out by the said Company at an advance of 5 per cent. over the price contracted, notwithstanding that this witness was examined on the direct examination by attorneys for plaintiff touching all these points.

Witness Harry Thompson was called by plaintiff and examined among other things as to contracts Camp & Thompson made with Dee & Connelly for 308 and 200 carloads of sewer pipe respectively, prior to the formation of the Union Sewer Pipe Company. He admitted that the firm of Camp & Thompson made such contracts, and that they were turned over to the Union Sewer Pipe Company, when Camp & Thompson was absorbed or went into the agreement with said Company, and the said Company was to carry out all agreements of its constituent companies, of which it was advised, and he advised them respecting these contracts.

The court denied defendants the right to read the cross-examination of this witness, touching the matters brought out on direct examination, other direct examination was read, which cross-examination would show that the Union

Sewer Pipe Company only carried out these contracts at an advance of 5 per cent. over the price contracted.

VII.

That the court erred in its opinion instructing the jury to find and return a verdict for the plaintiff—was guilty of manifest error in the statement of facts and conclusions of law therein contained; and the defendant Dee specially and severally assigned as error that the jury was not sworn to try the issues between him and the said Union Sewer Pipe Company until the close of the case, and after the jury was instructed to find a verdict against him.

The defendant, William E. Dee, separately assigns as error that the court erred in permitting the plaintiff to prove the alleged amount of indebtedness from the defendant Dee, to the Union Sewer Pipe Company after the plaintiff had rested its case and after the defendant had closed his testimony and during the course of the rebuttal testimony of the plaintiff.

VIII.

That the verdict of the jury in said cause is contrary to law.

IX.

That the said court erred in rendering judgment against the defendants in said cause upon the pleadings in said cause, and that said judgment is contrary to the law and the evidence as stated *in the pleadings* in said cause.

Assignments of error Nos. 7, 8 and 9 are argued in Assignment No. 6 under the court's instruction to the jury.

XIV.

The court erred in overruling the defendant's motion in arrest of judgment.

Wherefore, for these and other manifest errors, apparent on the face of the record in said cause, the defendants, Thomas Connelly and William E. Dee, plaintiffs in error herein, jointly and severally pray that the judgment of the said court may be reversed, and that such directions be given that full force and efficacy may inure to the defendants by reason of the defenses set up in their special notice of defenses and in their notice of set-off attached to and filed with their plea in this cause, and all amendments to such notices.

Each of the errors assigned is relied upon as a ground of reversal.

# BRIEF.

## I.

See argument, *infra*, p., p. 54-75.

The defendant in error is a pool, trust and combine directly and expressly contrary to and prohibited by the Illinois statutes, also the federal statutes and the common law.

*People vs. Sheldon*, 139 N. Y., 251.
*Judd vs. Harrington*, 139 N. Y., 105.
*Leonard vs. Poole*, 114 N. Y., 371.
*De Witt W. C. Co. vs. New Jersey, etc.*, 14 N. Y., Supp., 277.
*Morris Run Coal Co. vs. Barclay Coal Co.*, 68 Pa. St., 173.
*Nester vs. Brewing Co.*, 161 Pa. St., 473.
*Salt Co. vs. Guthrie*, 35 Ohio St., 666.
*Emery vs. Candle Co.*, 47 Ohio St., 320.
*Hoffman vs. Brooks*, 11 Wkl. Law Bul., 258.
*Anderson vs. Jett*, 89 Ky., 375.
*Chapin vs. Brown*, 83 Iowa, 156.
*Craft vs. McConoughy*, 79 Ill., 346.
*Moore vs. Bennett*, 140 Ill., 69.
*Ford vs. Association*, 155 Ill., 166.
*Bishop vs. Preservers Co.*, 157 Ill., 284.
*People ex rel. vs. Exchange*, 170 Ill., 556.
*Association vs. Niezerowski*, 95 Wis., 129.
*Vulcan Powder Co. vs. Hercules*, 96 Cal., 510.
*Oil Co. vs. Adone*, 83 Tex., 650.
*Association vs. Rock*, 14 La. Ann., 168.

*Hilton vs. Eckersley*, 6 El. & Bl., 47.
*Urmston vs. Whiteleg*, 63 L. T. (U. S.), 455.
*Richardson vs. Buhl*, 77 Mich., 632.
*Arnot vs. Coal Co.*, 68 N. Y., 558.
*People vs. Milk Ex.*, 145 N. Y., 267.
*People vs. Refining Co.*, 54 Hun., 366.
*State vs. Neb. Dist. Co.*, 29 Neb., 700.
*State vs. Standard Oil.*, 49 Ohio St., 137.
*Mfg. Co. vs. Klotz*, 44 Fed., 721.
*Distilling Co. vs. People*, 156 Ill., 448.
*Carbon Co. vs. McMillin*, 119 N. Y., 46.
*Harrow Co. vs. Hench*, 83 Fed., 36.
*Factor Co. vs. Adler*, 90 Cal., 110.
*Lumber Co. vs. Hayes*, 76 Cal., 387.
*Davies vs. Davies*, 36 Ch. Div., 359.
*Egerton vs. Earl Brownlow*, 4 H. L. Cas. 1 (Bridgewater case).
Beach on Monopolies and Trusts.
*United States vs. Trans-Missouri Freight Assn.*, 166 U. S., 290.
*United States vs. Addyston Pipe & Steel Co., et al.*, 85 Fed. Rep., 271.
Cook on Corporations, Sections 503 *a*, *b*, *c* and *d*, and cases cited in foot notes.

Where parties are engaged in *quasi* public employment, see:

*Gibbs vs. Gas Co.*, 130 U. S., 396.
*People vs. Gas Co.*, 130 Ill., 268.
*Stockton vs. Railroad*, 50 N. J. Eq., 52.
*West Va. vs. Pipe Line*, 22 W. Va., 600.
*Hooker vs. Vandewater*, 4 Denio, 349.
*Stanten vs. Allen*, 5 Denio, 434.

*Railroad Co. vs. Collins*, 40 Ga., 582.
*Hazelhurst vs. Railroad Co.*, 43 Ga., 13.

II.

Foreign corporations doing business in Illinois are subject to the same liabilities, restrictions and duties as domestic corporations and cannot exercise greater power, or enforce rights, although within charter powers, which were not granted by the laws of this State to similar corporations.

The defendant in error is a foreign corporation doing business in Illinois and amenable to the laws of the State.

See argument *infra*, p, p. 76-80.

1 Starr & Curtiss, Illinois Statutes, p. 1017.
*Farmers L. I. Co. vs. Lake St. Ry.*, 173 Ill., 439.
*Stevens vs. Pratt*, 102 Ill., 206.
*Penn. Ins. Co. vs. Banerle*, 143 Ill., 459.
*Rhodes, et al., vs. Missouri Co.*, 173 Ill., 621.
*Pope vs. Hanke*, 155 Ill., 617.
*Walters vs. Whitlock*, 9 Fla., 86.
Story on Conflict of Laws, Sec. 527.
*Faulkner vs. Hymen*, 142 Mass., 53.
*Hill vs. Spear*, 50 N. H., 253.
*Fisher vs. Lord*, 63 *Id.*, 514.
*Phinney vs. Baldwin*, 16 Ill., 108.
*Mumford vs. Kanty*, 50 Ill., 370.
*Evans vs. Anderson*, 78 Ill., 558.
*Anstedt vs. Sutter*, 30 Ill., 164.
*Yeatman vs. Cullen*, 5 Blackf., 240.
*Woodruff vs. Hill*, 116 Mass., 310.

*a.* By a long series of decisions it has been fully established that through an exercise of comity foreign corpora-

tions will be recognized and allowed to enforce their rights in a State except *so far as State statutes or clear public policy of the State prohibit it.*

*Clark vs. Cent. R. & B. Co.*, 50 Fed. Rep., 338.

*Beveridge vs. Hewitt*, 8 Ill. App., 467.

*Cothran vs. Ellis*, 125 Ill., 496.

*Irwin vs. Williar*, 110 U. S., 499.

*Phinney vs. Baldwin*, 16 Ill., 108.

*Chewning vs. Johnson*, 5 La. Ann., 678.

*Greenwood vs. Curtin*, 6 Mass., 358.

*Mumford vs. Canty*, 50 Ill., 375.

*Mandel vs. Swan*, 154 Ill., 177.

*Warren vs. Bank of Columbus*, 149 Ill., 9.

*Granite, Slate, etc., vs. Lloyd*, 48 Ill. App., 429.

*Santa Clara vs. Sullivan*, 116 Ill., 275.

*Barnes vs. Suddard*, 117 Ill., 237.

Story's Conflict of Laws (7th Ed), Vol. 2, pp. 567 to 571.

*b.* That a corporation is a person within the constitutional guaranty of equal protection of the laws, but is not a citizen within the guaranty of equal privileges and immunities. See note to *Louisville Safety Vault & T. Co. vs. Louisville & N. R. Co.* (Ky.), 14 L. R. A. 580-585.

Guthrie on the 14th Amendment to the Constitution of the U. S., page 53.

*I. C. R. R. Co. vs. Bloomington*, 76 Ill., 477.

*c.* Corporations created within the State are amenable to the police power of the State to the same extent as natural persons.

*Ruggles vs. The People*, 91 Ill., 256.

*d.* A citizen of one State going into another, is entitled, under the Federal Constitution, to no greater privileges and immunities than are possessed by the citizens of that State.

*Detroit vs. Osborne*, 135 U. S., 492.

III.

The Illinois anti-trust laws of 1891, and the amendatory act of 1893, is constitutional, and not class and special legislation in contravention of the Federal and State Constitutions.

See Argument, *infra*, p., p. 81-87.

*Ford vs. Milk Shippers' Assn.*, 155 Ill., 166.

*Harding vs. American Glucose Co.*, 182 Ill., 551.

*Re Oberg, Oregon Sup. Court*, 14 L. R. A., 577.

*State vs. Main* 16 Wis., 398.

*Minneapolis, etc., Ry. vs. Herrick*, 127 U. S., 210.

*Missouri Pac. vs. Humes*, 115 U. S., 512.

*Wurts vs. Hoagland*, 114 U. S., 606.

*Dow vs. Beidelman*, 125 U. S., 680.

*Missouri vs. Lewis*, 101 U. S., 22.

Followed by

*Sullivan vs. Hang*, 82 Mich., 548.

*Covington, etc., Turnpike Co. vs. Sandiford*, 164 U. S., 578.

*New York, etc., vs. New York*, 165 U. S., 628.

*New York, etc., vs. Bristol*, 151 U. S., 556.

*Ames vs. Union Pac.*, 64 Fed. Rep., 165.

*Brass vs. North Dakota*, 153 U. S., 391.

*Lowe vs. Kansas*, 163 U. S., 81.

*Duncan vs. Missouri*, 152 U. S., 377.
*Minn. vs. Illinois*, 94 U. S., 113, 69 Ill., 80.

*a.* Equal protection cannot be said to be denied whenever the law operates alike upon all persons and property similarly situated.

*Walston vs. Nevin*, 128 U. S., 578.
*State vs. Schlemmer*, 42 La. Ann., 1166.
*State vs. Moore*, 104 N. C., 714.
*Ex parte Swaim*, 96 Mo., 44.
*Barbier vs. Connelly*, 113 U. S., 32.
*Hoon Sing vs. Crowley*, 113 U. S., 709.

*b.* Legislation limited as to objects or territory does not infringe on the constitutional right of equal protection where all persons subject to it are treated alike, under like circumstances and conditions.

*Hayes vs. Missouri*, 120 U. S., 68.
*Minneapolis & St. Louis Ry. vs. Beckwith*, 129 U. S., 26.

*c.* The sale of goods by a foreign corporation within the State and sent from another State is an act of interstate commerce.

*Cook vs. Rome Brick Co.*, 98 Ala., 409.

## IV.

Because one section of an act is unconstitutional, it does not follow that the other sections of the same act, which are within the power given by the Constitution, should not be enforced.

See argument, *infra*, p., p. 88-90.
*Nelson vs. People*, 33 Ill., 390.
*Donnerberger vs. Prendergast*, 128 Ill., 229.

*The People vs. Reformatory*, 148 Ill., 426.
*Belleville vs. Railway*, 152 Ill., 188.
*Keokuk Co. vs. Keokuk*, 95 U. S , 80.
*Unity vs. Burrage*, 103 U. S., 459.
*Presser vs. Illinois*, 116 U. S., 252.
Also all the State and Federal decisions cited on p. 1088, Vol. VI, of American and Eng. Ency. of Law.

a See Penniman's case, 103 U. S., 714.
*Hills vs. Exchange Bank*, 105 Id., 319.
*Unity vs. Burrage*, 103 Id., 447.
*Florida Central Railroad Co. vs. Schutte*, Id., 118.
*Edwards vs. Pope*, 3 Scam., 465.
*People ex rel. vs. Cooper et al.*, 83 Ill., 585.
*Hinz vs. People ex rel.*, 92 Id., 406.

b *Van Horne vs. Dorrance*, 2 Dall. (U. S.), 309.
*Calder vs. Bull*, 3 Dall. (U. S.), 386.
*Fletcher vs. Peck*, 6 Cranet (U. S.), 87.
*Cooley's Court Lim.*, 182.
*Ogden vs. Sanders*, 25 U. S., 12 Wheat., 270.
*Clark vs. Rochester*, 24 Barb., 471.

V.

Federal courts. State laws as rule of decison. Decisions binding.

*Burgess vs. Seligman*, 107 U. S., 33.

## VI.

Exercise of the power of annulment only in cases where it is impossible to dispose of a cause on its merits.

*Ex p. Randolph*, 2 Brock (U. S.), 447.

Also foot notes on page 1084, Vol. VI, Am. & Eng. Ency. of Law.

## VII.

Other questions involved. Set-offs and counter-claims going to merits of the case stricken out on motion of defendant in error.

See argument, *infra*, p., p. 92-95.

*a.* Where defendant in an action seeks to recoup damages from plaintiff for breach of contract, it is immaterial that the damages alleged are unliquidated.

*Harlan vs. St. Paul Ry.*, 31 Minn., 427.

*Ward vs. Fellers*, 3 Mich., 281.

*Batterman vs. Pierce*, 3 Hill (N. Y.), 172.

15 Am. & Eng. Ry. Cases, 130.

*b.* On the trial of such a case it stands as though two separate suits were brought to determine rights of parties—in reality two suits are pending to be tried at same time.

*Merchants Bank vs. Schulenberg*, 54 Mich., 49.

*Francis vs. Edwards*, 77 N. Car., 271.

*c.* Where counter-claim is pleaded and raises issue of fact, issues should be tried by a jury, and a motion by plaintiff for judgment on the pleadings should be refused.

*Wilson vs. Hughes*, 94 N. Car., 182.

VIII.

Amendment of pleadings when necessary to present an issue on the merits, not discretionary, but a legal right.

Revised Statutes of Illinois, p. 144.
*Fontaine vs. Baxley*, 90 Ga., 416.
*Davis vs. Bean*, 114 Mass., 358.
*Powell vs. Love*, 36 W. Va., 97.
*McHardy vs. Wadsworth*, 8 Mich., 349.
*Drake vs. Drake*, 83 Ill., 526.
*Shufeldt vs. Fidelity Bank*, 93 Ill., 597.
*Kirkpatrick vs. Cooper*, 77 Ill., 565.
*Empire Co. vs. Trust Co.*, 1 Ill. App., 391.

IX.

Defendant in error should not have been allowed to prove the indebtedness of William E. Dee after it had closed its direct case, and on rebuttal.

X.

The exclusion of testimony offered by plaintiff in error—the deposition of the attorney-general of the State of Ohio.

See Argument, *infra*, p., p. 98 to end.

XI.

In conclusion of argument.

See Argument, *infra*, p. 98.

Compare contract in case at bar (Rec., p. 397; Trans., p. 128) with that held in restraint of trade in *United States vs. Addyston Pipe & Steel Co.*, Vol. 85, Fed. Rep., 271.

# ARGUMENT.

## I.

THE DEFENDANT IN ERROR, THE UNION SEWER PIPE COMPANY, IS A POOL, TRUST AND COMBINE DIRECTLY AND EXPRESSLY CONTRARY TO AND PROHIBITED BY THE ILLINOIS STATUTES, ALSO THE FEDERAL STATUTES, AND THE COMMON LAW.

MAY IT PLEASE THE COURT:

The evidence in this case shows facts and circumstances proving the defendant in error, and all its constituent Companies in the operation of a business which was a pool and combination of ten different Companies organized under the laws of the State of Ohio, in gross and flagrant violalation of every principle of the common law in relation thereto, and of the Federal statutes, and of every single provision of the anti-trust statutes of the State of Illinois above referred to. (Trans., p. 85; Rec., p. 217.) All these facts and circumstances are practically admitted by counsel for defendant in error to be absolutely true. (Trans., p. 145; Rec., p. 492.)

The organization and purpose of the Union Sewer Pipe Company is told by Byron W. Robinson, secretary of the said Company since 1893. (beginning on page 193 transcript; Rec., p. 606.)

Mr. Robinson testified: "Standard Akron Pipe" is a name long known to the trade; it has virtues over pipe of other manufacturers, being more impervious to moisture, more vitreous in texture and more uniformly good in quality than that made by others. It is made of a shale

first found at Sharon, Pennsylvavia. "It is a deposit of clay impregnated with iron. It is characteristic of the clay used by the Akron Companies."

"Ten companies manufacturing Standard Akron pipe entered into the contract with the Union Sewer Pipe Company." (Trans., p. 196; Rec., p. 610.) "After entering into contract with Union Sewer Pipe Company for the sale of their product, the different companies prosecuted their work as before. There was large increase in output after contract. (Trans., p. 197; Rec., p. 611.) There was no competition on Standard Akron Pipe after we entered into contract; we had the market all to ourselves." (Trans., p. 207; Rec., p. 631.)

"I was a stockholder in the Union Sewer Pipe Company; held four shares. The authorized capital was $20,000 divided into 200 shares; $2,800 of the stock was subscribed for, and $280 paid in." (Trans., p. 208; Rec., p. 632.)

"All the stockholders of the Union Sewer Pipe Company were stockholders of the constituent companies; that is, there was nobody in the Union Sewer Pipe Company except men who were connected with its constituent companies." (Trans., p. 209; Rec., p. 633.)

The purpose of this organization is told frankly by David E. Hill, the first president of the Union Sewer Pipe Company (on p. 63 of Transcript; Rec., p. 114); "I thought it was to the interest of all concerned to subscribe." "It was to the interest of the manufacturers because they saved money by the association. * * * Their expenses were far less combined than they were separate." "When the shops were separate they had to send out as many as four-

teen traveling men, while when they were combined they sent out only half that many; and, furthermore, it took less bookkeeping and saved office expenses."

Concerning the output of the corporations constituting the Union Sewer Pipe Company in 1893—at the time of its formation, Horace B. Camp testifies: "The yearly capacity of these corporations and firms was about 8,000 carloads of pipe at an approximate value of $75 a carload, making approximately a value of $600,000." (Trans., p. 76; Rec., p. 204.)

Then, again, concerning the purpose of the formation of the Union Sewer Pipe Company, the same witness testified:

"Q. Is it not a fact that you gentlemen, representing these different corporations and firms, agreed among yourselves previously to the incorporation of the Union Sewer Pipe Company as a corporation, that you would pool your interest and work through that Union?

"A. That is what our Companies contracted to do." (Trans., p. 77; Rec., p. 205.)

Taking the foregoing in connection with the contract these corporations entered into with the Union Sewer Pipe Company (Transcript, p. 128; Rec., p. 397) binding themselves to sell to the said Company all the sewer pipe on hand on the 15th day of February, 1893, and all they manufactured from the said date until the 31st day of December, 1900, and the other provisions of said contract, can it be successfully disputed that this $20,000 corporation, with a subscribed capital of $2,800 and a paid in capital of $280, was anything more than a pool or combine of the manufacturers of Akron sewer pipe for the purpose of controlling the market, stifling competition and defeating justice?

The effect of this combination on prices was that dealers were compelled to pay 5 per cent. more for pipe than before the formation of the Union Sewer Pipe Company, but while there is a conflict of testimony as to whether or not there was an advance in prices, *the undisputed fact remains that the tendency of prices was downwards and the Union Sewer Pipe Company kept the prices stationary.* (Trans., p. 118; Rec., p. 48.) This, however, is immaterial in a discussion of this case, as the courts have repeatedly held that it is not necessary to show that competition was in fact destroyed, or prices unreasonably advanced. It is enough to know that the inevitable tendency of such combinations is injurious to the public.

The contract between the Union Sewer Pipe Company and its constituent companies (Rec., p. 397; Trans., p. 128) furnish the evidence and purpose of the organization of the corporate body, and the object of its organization is to be determined by that instrument.

From this contract it will be found that there are reciprocal relations between the Union Sewer Pipe Company and its ten constituent companies, which may be summarized as follows: Defendant in error's corporate existence is recognized and admitted by all constituent companies; it agrees to buy all the product they have on hand; they in return agree to sell to it all the pipe they manufacture from 15th day of February to the 31st day of December, 1900, thus cornering the market for the commodity known as standard Akron pipe for the said period. The contract then parcels off among the constituent companies the percentage of orders each company shall receive; the contract fixes the price each company shall receive on orders distributed as aforesaid, and in case of over production the

constituent companies shall be penalized by having their stock taken at a reduced price; that the contracts are entered into with the understanding that similar contracts have been entered into and will be entered into with other manufacturers; that the standard and size of pipe shall be fixed by defendant in error, and after the expiration of contract, constituent companies are at liberty to buy back all pipe on hand, etc.

The foregoing, taken in connection with evidence, discloses that the object of the organization of the Union Sewer Pipe Company was to control the price of, and the purchase and sale of, standard Akron sewer pipe throughout the United States, and this action was carried out by the concurrent action of the members and the Company; by the action of the Union Sewer Pipe Company on the one part, aided by the agreement of its members, who by assenting to such an organization and entering into such an agreement, carry out a scheme which is a combination, agreement or trust, by which they fix the price of an article of merchandise and limit the production and the quantity to be sold throughout the United States. It is clearly a combination in violation of the statute of Illinois and in restraint of trade, and in violation of the Federal statutes, inasmuch as in the case at bar there is a sale of goods by a foreign corporation within the State, and sent from another State, and therefore an act of interstate commerce to which the Federal statutes applies.

And in support of this proposition I cite the following authorities:

In *People vs. Sheldon*, 139 N. Y., 251, 34 N. E. 785, all the coal dealers in the city of Lockport, N. Y., entered into a contract of association, forming a coal exchange to

prevent competition by constituting the exchange the sole authority to fix the price to be charged by members for coal sold by them, and the price was thus fixed. The court approved a charge to the jury that even if this was merely a combination between independent coal dealers to prevent competition between themselves for the due protection of the parties to it against ruinous rivalry, and although no attempt was made to charge unreasonable or excessive prices, it was inimical to trade and commerce, whatever might be done under it, and was within the state statute making a conspiracy injurious to trade indictable. Said Andrews, C. J. (page 264, 139 N. Y., and page 789, 34 N. E.):

> "If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing."

See, to the same effect, *Judd vs. Harrington*, 139 N. Y., 105; *Leonard vs. Poole*, 114 N. Y., 371; *De Witt Wire-Cloth Co. vs. New Jersey Wire-Cloth Co.* (Com. Pl.) 14 N. Y. Supp., 277.

In *Morris Run Coal Co. vs. Barclay Coal Co.*, 68 Pa. St., 173, five coal companies controlling the bituminous coal trade in Northern Pennsylvania agreed to allow a committee to fix prices and rates of freight, and to fix proportion of sales by each. Competition was not destroyed, because the anthracite coal and Cumberland bituminous coal were sold in competition with this coal. The association was, nevertheless, held void, as in illegal restraint of

trade and competition, and tending to injure the public. In *Nester vs. Brewing Co.*, 161 Pa. St., 473, forty-five brewers in Philadelphia made an agreement to sell beer in Philadelphia and Camden at a certain price to be fixed by a committee of their number. Though beer could hardly be said to be an article of prime necessity like coal, yet, as it was an article of merchandise, the contract was held void, as in restraint of trade, and tending to a monopoly.

In *Salt Co. vs. Guthrie*, 35 Ohio St., 666, the salt manufacturers of a salt producing territory in Ohio, with some exceptions, combined to regulate the price of salt by preventing ruinous competition between themselves, and agreed to sell only at prices fixed by a committee of their number. The Supreme Court of Ohio held the contract void. Judge McIlvane, who delivered the opinion of the court, said:

> "The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on the ground of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public. It is enough to know that the inevitable tendency of such contracts is injurious to the public."

Other Ohio cases which presented similar facts, and in which the same rule was enforced, are *Emery vs. Candle Co.*, 47 Ohio St., 320, and *Hoffman vs. Brooks*, 11 Wkly. Law Bul., 258.

In *Anderson vs. Jett*, 89 Ky., 375, two owners of steamboats running on the Kentucky river made an agreement to keep up rates, and divide net profits, to prevent ruinous competition and reduced rates. The contract was held void.

In *Chapin vs. Brown*, 83 Iowa, 156, 48, the grocerymen in a town, in order to avoid a trade in butter which was burdensome, agreed not to buy any butter or to take it in trade except for use in their own families, so as to throw the business into the hands of one man who dealt in butter exclusively. The agreement was held invalid, because in restraint of trade, and tending to create a monopoly.

In *Craft vs. McConoughy*, 79 Ill., 346., five grain dealers in Rochelle, Ill., agreed to conduct their business as if independent of each other, but secretly to fix prices at which they would sell grain, and to divide profits in a certain proportion. This was held void, as in restraint of trade, and tending to create a monopoly. In *More vs. Bennett*, 140 Ill., 69, articles of association entered into by only a part of the stenographers of Chicago to fix a schedule of prices, and prevent competition among their members and a consequent reduction of prices, was held void. The court said:

> "A combination among a number of persons engaged in a particular business to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would be if left to the influence of unrestricted competition, is contrary to public policy. Contracts in partial restraint of trade which the law sustains are those entered into by a vendor of a business and its good will with its vendee, by which the vendor agrees not to engage in the same business within a limited territory; and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased."

In *Association vs. Niczerowski*, 95 Wis., 129, the suit was on a note given in pursuance of the secret rules of an

association of 60 out of the 75 master masons in Milwaukee, by which all bids for work about to be let were first made to the association, and the lowest bidder was then required to add 6 per cent. to his bid, and, if the bid was more than 8 per cent. below the next lowest bidder, more than 6 per cent. might be added. Each member was required to pay to the association 6 per cent. of his estimates when due, for subsequent distribution. In declaring the contract void, the court said:

> "The combination in question is contrary to public policy, and strikes at the interests of those of the public desiring to build, and between whom and the association or the members thereof there exists no contract relations."

In *Vulcan Powder Co. vs. Hercules Powder Co.*, 96 Cal., 510, four powder companies of California agreed that each should sell at a price to be fixed by a committee of their representatives, and should pay over to the others the profits on any excess of sales over a fixed proportion of the total sales. The contract was held void.

In *Oil Co. vs. Adoue*, 83 Tex., 650, five owners of cotton-seed oil mills in Texas made an agreement not to sell at less than certain agreed prices. One guaranteed profits to the four others, and suit was brought on the guaranty. It was held void, as restraining trade, and tending to a monopoly, even though the evidence failed to establish that it effected a monopoly.

In *Association vs. Kock*, 14 La. Ann., 168, eight commercial firms in New Orleans holding a large quantity of cotton bagging entered into an agreement by which they stipulated that for three months no member should sell a bale except by a vote of the majority. It was held that

the contract was "palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice."

In *Hilton vs. Eckersley*, 6 El. & Bl., 47, it was held that an agreement between 18 cotton manufacturers to submit to the control of a committee of their number for 12 months the question as to prices to be paid for labor and the terms of employment, in order to resist the aggressions of an association of workingmen, was void and unenforceable, because in restraint of trade.

In *Urmston vs. Whitelegg*, 63 L. T. (N. S.), 455, a case in the queen's bench division, before Day and Lawrence, JJ., the action was brought to enforce a penalty under the rules of the Bolton Mineral Water Manufacturers' Association, which recited that the object of the association was to maintain the price of mineral water, and bound the members for 10 years not to sell at less than 9d. a dozen bottles, or at not less than any higher price fixed by the committee, on penalty of £10 for each violation. Day, J., said:

> "If a contract for raising prices against the public interest is a contract in restraint of trade, this is undoubtedly such a contract. During the last hundred years great changes have taken place in the views of the public, of the legislature, and therefore of the judges, on the matter, and many old-fashioned offenses have disappeared; but the rule still obtains that combination for the mere purpose of raising prices is not enforceable in a court of law. This contract is illegal in the sense of not being enforceable. It is not necessary that it should be such as to form the ground of criminal proceedings."

In the foregoing cases the only consideration of the

agreement restraining the trade of one party was the agreement of the other to the same effect, and there was no relation of partnership, or of vendor and vendee, or of employer and employe. Where such relation exists between the parties, as already stated, restraints are usually enforceable if commensurate only with the reasonable protection of the covenantee in respect to the main transactions affected by the contract. But, in recent years, even the fact that the contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. Such cases go a step further than those already considered. In them the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. In such cases the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract, and the transfer of property and good will, or the partnership agreement, is merely ancillary and subordinate to that purpose. The principal cases of this class are

*Richardson vs. Buhl*, 77 Mich., 632, p. 43.
*Arnot vs. Coal Co.*, 68 N. Y., 558.
*People vs. Milk Exchange*, 145, N. Y., 267.
*People vs. Refining Co.*, 54 Hun., 366.
*State vs. Nebraska Distilling Co.*, 29 Neb., 700.
*State vs. Standard Oil Co.*, 49 Ohio St., 137, and other cases cited under "Point I" of Brief.

In addition to the cases cited, there are others which sustain the general principle, but in them there exists the additional reason for holding the contracts invalid that the parties were engaged in a *quasi* public employment. They are *Gibbs vs. Gas Co.*, 130 U. S., 396, and other cases cited at end of "Point I" of Brief.

Public policy is a variable quantity. It must vary, and does vary, with the habits, capacities and opportunities of the public.

*Davies vs. Davies*, 36 Ch. Div., 359.

"There certainly is a large class of decisions which will be found collated in the report of the recent Bridgewater case in the House of Lords, to the effect that if a contract or will is, in the opinion of the judges before whom it comes in suit, clearly contrary to public policy, so that by giving effect to it the interests of the public would be prejudiced, it is to be adjudged void."

*Hilton vs. Eckersley*, 6 E. & B., 47.

(*Egerton vs. Earl Brownlow*, 4 H. L. Cas., 1, is the Bridgewater case.)

Public policy is that which is best for the common good of the community.

Bridgewater case, *supra*.

The forms in which the monopolistic agreements are made is immaterial; the courts will not regard mere forms or permit subterfuge to thwart protection of public interests.

*Craft vs. McConoughy*, 79 Ill., 346.

In case of an agreement resulting in an actual monopoly, the essential tendency of which is to suppress competition,

the extent of space or duration of time within which it is designed to operate is unimportant.

Spelling 93, citing *Texas Standard Oil Co. vs. Adour*, 19 S. W., 274.

Courts will take judicial notice of the effect of carrying out a contract whose object is the suppression of competition which is necessary and useful to the public, and it is not necessary that the monopoly appear from the express terms of the contract.

*Id.*, 94, 95, citing *More vs. Bennett*, 140 Ill., 69.

Also, *Chaplain vs. Brown* (Iowa), 48 N.W., 1074.

*Texas Standard Oil Co. vs. Adour, supra.*

Where corporations form a trust amounting in legal effect to a co-partnership, their acts in entering into it are contrary to public policy.

Spelling, 180.

The question in construing such contract is not what mischief has been done, but what may be done.

*Id.*, 182, citing cases.

Then follows on pages 19 to 21 inclusive, review of the cases from the earliest date down, in support of the above propositions.

Then on pages 21 to 24 inclusive, is found a review of the cases as to partial restraint of trade, closing on page 24 with the statement that "such is a *resume* of the history of the common law doctrine as to restraint of trade."

Then follows on pages 24–27, review of English equity decisions.

In America the question is the reasonableness of the restraint *in view of the public interest.*

*Id.*, 28.

*At present there is a strong tendency to restrict the right of restraint as shown in recent statutes and decisions, both Federal and State.*

*Id.*, *Ib.*

The Federal statute makes all contracts, combinations, etc., in restraint of trade, etc., and every attempt at monopoly, etc., crime.

*Id.*, *Ib.*

For definitions and discussions of public policy and changes therein, with citation of cases, please see *Id.*, page 37 *et seq.*

However definitions may differ, "This rule may be safely laid down, that wherever any contract conflicts with the morals of the times or contravenes any established interest of society it is void as being against public policy."

*Id.*, 43, citing Story on Contracts, section 675.

**Where the Legislature has indicated a policy of the State that is the rule for the courts.** In the absence of such a guide the latest decisions in equity will be followed.

*Id. Ib.*, 46–47, citing cases.

*When a contract in restraint of trade falls under a statutory provision, such statute settles all questions of public policy and reasonableness.*

(*Id.*, 145–146.)

Illinois statute in relation to pools, trusts, etc., referred

to with the statement that it has served as a model for legislation in other States.

*Id.*, 284–285.

Conspiracies in restraint of trade are under some statutes crimes, and under others misdemeanors.

*Id.*, 246–247.

(NOTE.—Illinois statutes makes it a misdemeanor, punishable by fine and imprisonment, and declares contracts void in violation thereof.)

Principle upon which contract in restraint of trade are held invalid, stated.

*Id.*, 107–108, citing cases.

All restraints presumed bad, but, if facts shown, court will reach its conclusion from them.

*Id.*, same foot note.

All general restraints are void, as are also all unreasonable partial restraints.

*Id.*, 142.

Not only are railroads, telegraph, telephone and gas companies engaged in public business which may be regulated by statute, but the business of bread baking and laundry and others of like character, are of public nature and the State has the power to regulate all corporations engaged in such. *Id.* 412, *et seq.*, particularly sections 144-145.

Is not the making and sale of sewer pipe as much of a public or *quasi* public character as the baking business or laundry business?

Chapter 11, Beach on Monopolies and Trusts, beginning

at page 503, relates to industrial trusts, and Chapter 12, beginning at page 543, relates to trust combinations.

Please see particularly Sections 174 and 175 as to monopoly under patents, to the effect that while a patent is a grant of a monopoly for the manufacture and sale of the article patented *it confers no power or right of illegal combinations or pools, etc.*, citing *National Harrow Company vs. Hench*, 76 Fed. Reporter, 667–669, and many other cases.

Such combinations are as obnoxious to the public interest as if the parties were dealing in unpatented articles.

*National Harrow Company vs. Hench, supra,*
cited by Beach on page 577.

For a review of the anti-trust legislation of the different States and the United States, see Chapter 13, beginning on page 599, giving the statutory provisions.

For the opinion of U. S. Supreme Court on subject, see *United States vs. Trans-Missouri Freight Association*, 166 U. S., p. 290, beginning at the fourth line before the end of page 322.

And on page 337, in quoting from and approving the opinion of Justice Shiras, in same case in Circuit Court of Appeals, the Supreme Court say:

> "Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; *yet balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world.*"

See *United States vs. Addystone Pipe & Steel Co. et al.*, 85 Fed. Rep., 271.

**The Policy of Illinois as to Combines, Pools and Trusts.**

The anti-trust statute of Illinois approved June 11, 1891, and in force July 1st, 1891, as amended in 1893, is found on pages 1252 to 1255, inclusive, of volume 1 of Starr & Curtis statutes. (They are set out in Transcript, page 249; also such parts as are material for this discussion in this brief and argument).

The act to define trusts and conspiracies against trade, etc., approved June 20, 1893, and in force July 1st, 1893, is found on pages 1256 and 1557 of the same volume.

The Amendment of 1897 to the Act of 1891, is found in the laws of 1897, on page 153.

Many decisions of Illinois Appellate and Supreme Courts, constructing these statutes and enforcing them, and also determining the principles of the common law applicable to pools, trust and combines in this State are already cited and quoted from in the brief and argument in this cause.

It will be seen that the State of Illinois both in its statutes and its decisions, has taken and adhered to an advance position against restraints of trade, and against pools, trusts and combines to control trade, to regulate and control prices, etc.

As showing the policy in this State please see *Chicago Gas Light Co. vs. Peoples Gas Light Co.*, 121 Ill., pages 545 and 546.

Please see also cases there cited by court and counsel.

Efforts to prevent competition by restraining individual efforts and freedom of action in trade and commerce, are hostile to public welfare, not consonant with the spirit of our institutions, and in violation of law. *The People ex rel., etc., vs. The Chicago Live Stock Exchange*, 170 Ill., 556.

Whatever tends to create a monopoly is unlawful as being contrary to public policy. *Id. Ib.*, and cases cited.

An agreement providing for the welding together of all the interests of a certain business into one giant combination or partnership, under the absolute dominion and control of a board of trustees, is void as contrary to public policy. *Bishop, etc., vs. American Preservers' Co.*, 157 Ill., 284.

A corporation cannot enter into a partnership. *Id. Ib.*

A foreign corporation in so far as it is doing business in Illinois is subject to the same restrictions and duty as corporations formed in this State. *Id. Id.*

We refer to the opinion in the above case as a part of this brief and argument in support of plaintiffs in error.

Also the case of *The Distilling and Cattle Feeding Co. vs. People ex rel., etc.*, 156 Ill., 448.

We quote the language of the Supreme Court of Illinois in *Ford et al., vs. The Chicago Milk Shippers Association*, 155 Ill., 166, pp. 179-180, as follows:

> "It is urged that the corporation cannot *alone* enter into a trust or combination that would be a violation of this statute. Whilst it is true, as a general proposition that a corporation may be created and constituted a legal entity, existing separate and apart from the natural persons composing it, yet it connot act independently, or against the will, or abstain from comply-

ing with the direction of the natural persons who constitute the corporate body. A corporation is, in fact, an association of persons united in one body, having perpetual succession, vested with political rights conferred upon it by the authority creating it. (Morawetz on Corp., Sec. 227; I Kyd. on Corp., p. 13). Such being the nature of the corporate body, *acts done by it are the acts of the associated person*, as corporators or as individuals, and in which capacity the act is done must be determined from the nature and character of the act, and the purpose for which the corporation was organized. (*State ex rel. vs. Standard Oil Co.*, 149 Ohio, p. 137). And when the acts of the corporate body are in violation of the statutes of the State, *and would be a misdemeanor* that would subject it to punishment in accordance with law, such acts are wholly without the lawful power of the corporation, as the State will create nobody with authority to violate its laws. *And where, in the organization of the corporate body or the control exercised by the stockholders in determining the agencies selected for managing its business*, THE BUSINESS AS THUS CONDUCTED, MANAGED AND CONTROLLED IS AGAINST PUBLIC POLICY OR IN CONTRAVENTION OF THE STATUTES OF THE STATE. **such acts of the corporate body and of the individual shareholders are the combined acts of all, and courts are not so powerless that they may not prevent the success of ingenious schemes to evade or violate the law.** *There can be no immunity for evasion of the policy of the State*, by its own creation. The corporation, as an entity, may not be able to create a trust or combination *with itself*, BUT ITS INDIVIDUAL SHAREHOLDERS MAY, IN CONTROLLING IT, TOGETHER WITH IT, CREATE SUCH TRUST OR COMBINATION THAT WILL CONSTITUTE IT, WITH THEM, ALIKE GUILTY."

Could any language possibly be more pertinent, or more forcible, in this case than that above quoted from the opinion of this court?

In concluding our argument on this question we beg leave to refer the court to Sections 503a, 503b, 503c and 503d, of the edition just published, of Cook on Corporations and the cases there cited in the foot-notes.

We quote a portion of these sections here:

"The purpose of the 'trust' is to control prices, prevent competition, and cheapen the cost of production. The Standard Oil Trust, The American Cotton-seed Oil Trust, and the Sugar Trust were examples of this method of combination." (Page 910.)

"But the word 'trust' has a wider and more popular meaning. It is used to designate any combination of producers for the purpose of controlling prices and suppressing competition. In this sense of the word, all contracts, agreements and schemes whereby those who were competitors combine to regulate prices are 'trusts.'"

"The courts have held with great uniformity that these combinations are illegal *if their purpose is to restrict production, raise prices, or restrain trade.* The law is clear that any combination of competing concerns *for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy and is void. This principle of law has been applied with great rigor to trusts*, the recent combinations in trade. The two leading cases on the subject are the Sugar Trust decision in New York and the Standard Oil Trust decision in Ohio many cases showing the different circumstances under which the rule has been applied are given in the notes below, arranged in the alphabetical order of the various States." (Pages 911-912.)

"These cases indicate the complicated questions and im-

portant litigation that have arisen by reason of the trusts. It is believed, however, that the volume of such litigation will decrease rather than increase in the future." (Pages 912-913.)

(NOTE: Why does this author express this as his opinion unless he thinks that trust promoters, educated by numerous adverse decisions as they have been, have at last hit upon a plan, namely, by chartering gigantic corporations in New Jersey, to evade and defeat, for the future, the settled policy of the other States, as declared by their statutes and decisions. The author certainly does not base such opinion on any supposition that trusts and trust promoters are dead, as they are certainly becoming more numerous and more powerful daily.)

We quote further from Cook, as follows: "Most of the great trusts have been *driven* from their original mode of organization and have reorganized *by conveying all their property to a corporation organized for the purpose of taking over the property.* Such has been the case with the Sugar Trust and the Cotton Seed Oil Trust. The dicisions of the New York Court of Appeals against the Sugar Trust, and the Supreme Court of Ohio against the Standard Oil Trust, have convinced the trusts that their original *mode* of organization was illegal *and must be abandoned.* The result has been that *the trusts* for the most part *have reorganized* AND REAPPEARED IN THE FORM OF GIGANTIC CORPORATIONS. *How far the law will interfere with this class of corporations remains to be seen.* In the Chicago Gas Company case the Supreme Court of Illinois, forfeited the charter of the Company *on the ground that it was formed to bring about an illegal combination. New Jersey, on the other hand, grants broad charters to the combinations*

AND RECEIVES A HEAVY TOLL FOR THE PRIVILEGES AND IMMUNITIES GRANTED. *The past five years have changed but little the status of the whole question.*" (Pages 914-919.)

"The Supreme Court of the United States has declared illegal railroad pooling contracts as being contrary to the anti-trust Act of Congress of 1890. But aside from this, THE LAW HAS INTERFERED BUT LITTLE WITH THESE GREAT COMBINATIONS."

It thus appears that trust promotors have been driven from Illinois, and most of the other States, to seek New Jersey charters; and been driven by the decisions of Illinois, and the courts of last resorts in most of the other States, *to abandon their original plans which showed a trust, and combination and pool*, UPON THEIR FACE.

Upon this review of the facts, the law and the authorities, there can be no doubt that the association of the defendant in error was void at common law, because in restraint of trade, and tending to a monopoly; was void under the Federal statutes, and was in violation of the statutes of the State of Illinois.

## II.

FOREIGN CORPORATIONS DOING BUSINESS IN ILLINOIS ARE SUBJECT TO THE SAME LIABILITIES, RESTRICTIONS AND DUTIES AS DOMESTIC CORPORATIONS, AND CANNOT EXERCISE GREATER POWER, OR ENFORCE RIGHTS, ALTHOUGH WITHIN CHARTER POWERS, WHICH WERE NOT GRANTED BY THE LAWS OF THIS STATE TO SIMILAR CORPORATIONS. THE UNION SEWER PIPE COMPANY, DEFENDANT IN ERROR, IS A FOREIGN CORPORATION DOING BUSINESS IN ILLINOIS AND AMENABLE TO THE STATUTES OF ILLINOIS.

*a.* Comity between States does not require a law of one State to be executed in another State when it would be against the public policy of the latter State.

*b.* It is now settled that corporations are persons within the meaning of the Constitution and the statutes of the States.

*c.* Corporations created within the State are amenable to the police powers of the State to the same extent as natural persons.

The above propositions are supported by statute, and numerous decisions, in this State and other States. The question naturally arises: Could an Illinois citizen defeat our laws as the Union Sewer Pipe Company is attempting to do in this case? We say, unhesitatingly no. The Illinois anti-trust statute has been enforced repeatedly in this State against the citizens of this State. This statute was enforced and its validity declared in *Ford vs. Chicago Milk Shippers Assn.*, 155 Ill., 166; *Bishop vs. American Preservers Co.*, 157 Ill., 284; and quite recently (and about a month previous to the decision in the case at bar) in *Harding vs. American Glucose Company*, 182 Ill., 551.

The defendant in error is a citizen of Ohio and is suing upon a contract made with citizens of Illinois. (For contract see Rec., p. 566; Trans., p. 176.) In pursuance of said contract defendant in error shipped cars of pipe from Ohio to Illinois and is claiming a settlement from William E. Dee for pipe shipped under said contract, and from Thomas Connelly for notes given in pursuance of the said contract for pipe shipped, which notes are dated Chicago, Illinois (Rec., p. 100; Trans., p. 56), and therefore the laws of the State of Illinois are the laws applicable to the contracts sued on, and the defendant in error is amenable to the laws of the State of Illinois and subject to the same liabilities, restrictions and duties as domestic corporations, and if a domestic corporation cannot enforce the rights it is seeking to enforce, the defendant in error has certainly no standing in court to enforce its alleged rights.

In support of above proposition we cite the following authorities:

Section 26 of the Act concerning corporations (1 Starr & Curtis Stat., p. 1017) provides that: "Foreign corporations, and the officers and agents thereof, doing business in this State, shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this State, *and shall have no other or greater powers.* And no foreign or domestic corporation established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate, in this State, except as provided for in this Act."

In the *Farmers Loan and Trust Company vs. The Lake Street Elevated Railroad Company et al.*, 173 Ill., p. 439, this court after quoting said Section 26, on page 451, refers to the fact that the appellant in that case was organized in

New York for the purpose of accepting trusts, and for other purposes; and then refers to the provisions of the Illinois statutes regulating trusts, and holds that by virtue of said Section 26 the position of the appellant was the same as that of a domestic corporation. And on page 455 this court say:

> "In *Stevens vs. Pratt*, 102 Ill., p. 206, it was held that the purpose of Section 26 of the general incorporation Act, as above quoted, was to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character *and bring them all under the influence of the same law*. In *Pennsylvania Insurance Co. vs. Bauerle*, 143 Ill., p. 459, it was held that under a devise to the Pennsylvania Company, and to certain other parties, as trustees, the Pennsylvania Company had no power to act in this State as such trustee without compliance with the statute in question, which requires a deposit of $200,000 in stocks or other securities, etc."

And in *Rhodes et al., vs. The Missouri Savings & Loan Company*, 173 Ill., p. 621, after quoting said Section 26, this court, on page 628, say:

> "It will be seen that under the statutes, and under the general rule of comity existing between States, we will allow to foreign corporations a standing in our courts to enforce the *valid* contracts they may have made with our citizens, and all *valid* liens against property situated in this State. But that rule of comity does *not* require that we should allow foreign corporations to enforce contracts here if such enforcement would be in conflict with our law, and, being thus in conflict, the enforcement whereof would work against our own citizens and give to the citizens of another State an advantage which the resident has not." (*Walters vs. Whitlock*, 9 Fla., p. 86.)

As has been said by this court in *Pope vs. Hanke*, 155 Ill., p. 617 (on p. 928):

"*Comity between different States does not require a law of one State to be executed in another when it would be against the public policy of the latter State.* NO STATE IS BOUND TO RECOGNIZE OR ENFORCE CONTRACTS WHICH ARE INJURIOUS TO THE WELFARE OF ITS PEOPLE, OR WHICH ARE IN VIOLATION OF ITS OWN LAW." Citing Storey on Conflict of Laws, Sec. 527: *Faulkner vs. Hymen*, 142 Mass., p. 53; *Hill vs. Spear*, 50 N. H., p. 253; *Fisher vs. Lord*, 63 *Id.*, p. 514.

This court upon further references to statutes and authorities, held that the foreign corporation, in that case, could not exercise greater power or enforce rights, although within its charter powers, which were not granted by the laws of this State to similar corporations.

In *Pope vs. Hanke*, 155 Ill., p. 167, this court, after concluding that the note sued on was valid and enforceable by an innocent purchaser in Missouri where the note was made, say, on page 27:

"This being so, can a recovery be had in this State upon the notes here sued upon? The *general rule* is, that the validity of a contract is to be governed by the law of the State where it is made (*Phinney vs. Baldwin*, 16 Ill., p. 106; *Mumford vs. Kanty*, 50 Ill., 370), and in the application of this principle to notes, *it is held that the laws of the State where a note is made will govern as to the defenses which can be set up against a recovery thereon.*"

*Evans vs. Anderson*, 78 Ill., 558.

"While it is true, however, that one State or nation will recognize and execute the laws of another through comity, yet *the principle of comity does not permit the enforcement of foreign laws, which are prejudicial to the interests of the State where they are sought to be enforced.* A CONTRACT MADE IN ONE STATE WILL NOT BE ENFORCED IN ANOTHER, WHEN TO DO SO WOULD CONTRAVENE THE CRIMINAL LAWS OF THE LATTER

STATE, OR WOULD BE AGAINST THE EXPRESS PROHIBITION OF ITS LAWS. **Comity between different States does not require a law of one State to be executed in another when it would be against the public policy of the latter State. No State is bound to recognize or enforce contracts which are injurious to the welfare of its people, or which are in violation of its own law."**

This court then cites *Mumford vs. Canty, supra*, and other authorities, in support of the above text, and then examines the Illinois statutes and Illinois decisions, and holds that under them the note in question was not enforceable even in the hands of an innocent purchaser, and that our law was the one that should govern, and not that of Missouri, and "that comity does not require us to ignore "the statute of Illinois, under which these notes are void "even in the hands of an innocent purchaser, in order to "permit a defense which would be allowed under the law "of a foreign State. The enforcement of such foreign law "would contravene the criminal code of this State, *and* "*would be in opposition to its public policy*, and to the ex- "press prohibition of its statutory enactments, *and would be* "*prejudicial to the interests of its people*."

In *Clark vs. Central R. & B. Co.*, 50 Fed. Rep., 338, *held:* Comity between States will not authorize foreign a corporation to exercise powers within the State which a domestic corporation would not be permitted to exercise under the constitution and policy of the State.

See authorities cited under Point 2 *a*, 2 *b*, 2 *c*.

## III.

THE ILLINOIS ANTI-TRUST LAW OF 1891, AND THE AMENDATORY ACT OF 1893, IS CONSTITUTIONAL.

The contrary was held in this case:

1. The court held that Section 9 of the Illinois Anti-Trust Law of 1893, which provides that "the provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser," taints the whole Act and renders it void as class and special legislation in contravention of the Federal and State Constitutions.

2. The court denies its power to hold other Sections of the Act valid, because to do so would make the Act binding upon a class of persons in the State which the Legislature had specially exempted from its provisions.

The objection urged to this statute is that because one section exempts "agricultural products or live stock while in the hands of the producer or raiser" it is special and class legislation.

It has been held so often that a classification which is natural and not arbitrary is a proper one to be legislated upon, that authority seems hardly necessary. Yet this is the point upon which this case was decided in the court below. The latest expression of the Supreme Court of this State is that of *Lasher vs. People*, 183 Ill., 231.

"The Legislature have the power to form classes for the purpose of police legislation, if they do not arbitrarily discriminate between persons in substantially the same situation."

As to the Act of 1891, it is sufficient to reply that the Supreme Court of Illinois held it constitutional, by its holdings that the trial court properly refused to hold as law the propositions submitted, in *Ford et al., vs. The Milk Shippers' Association*, 155 Ill., 166. The proposition submitted in said case being the same as in the case at bar.

And recently in the case of *Harding vs. American Glucose Co.*, 182 Ill., 551, the constitutionality of the same law as amended by the law of 1893, and again amended in 1897, was challenged by one of the most powerful corporations, but it was unable to point out any defect in the law and the Supreme Court upheld its validity.

The undoubted rule is, that the decision of a State court of last resort as to the constitutionality of a State law is binding on State courts and the courts of the United States. When that decision has been rendered, all that remains for the Federal Courts which may be called upon to administer the statute, is to determine whether it is consonant with the Constitution of the United States, and if it is, to enforce it. Now, in deciding that the Illinois Anti-Trust Law is in conflict with the Constitution of the State of Illinois, the judge below overruled the Illinois Supreme Court, and in holding it inconsistent with the 14th Amendment to the Constitution of the United States he overruled the Supreme Court of the United States.

The two decisions cited above are conclusive as to its conflict with the Constitution of the State of Illinois. As to the Federal Constitutional provision,

The 14th Amendment to the United States Constitution "is not designated to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good

order of the people." (*Barbier vs. Connelly*, 113 U. S., 27). Applying that principle, it was held that the 14th Amendment did not prevent the city of San Francisco from forbidding the operation of laundries between the hours of 10 o'clock P. M. and 6 A. M. within certain prescribed limits of the city. The people who wanted to run their laundries between those hours and within those limits thought that they were deprived of the equal protection of the laws in being subjected to penalties not visited upon other laundrymen operating in other districts of the city at all hours of the day and night, and therefore invoked the protection of the 14th Amendment. But the Supreme Court of the United States thought otherwise. "It would be an extraordinary usurpation of the authority of a Municipality," said Justice Field, "if a Federal tribunal should undertake to supervise such regulations. * * * The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced. * * * There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. * * * It is not legislation discriminating against any one. All persons engaged in the same business within the prescribed limits are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions." The distinction is made so clear by Judge Field that a volume of decisions could not make it clearer. The first section of the 14th Amendment was intended to forbid the enactment of laws which would bear unequally on different individuals in the same situation, measuring its rewards and penalties, not according to the nature of the Act, but according to the person who does

it. In the case at bar, the Union Sewer Pipe Company, by going into farming and stock raising, can escape the penalties of the Illinois Anti-Trust Law, and farmers and stock raisers who corner the sewer-pipe market will find themselves succeeding to the pains and penalties which the law denounces against the trusts.

**This section is not a discrimination in "persons." It is a discrimination in "things," and gives to every person an unrestricted right to engage in handling the same "things."** There is no invidious discrimination against any corporations or persons.

The objection that this is class legislation has no force. As said by the Supreme Court of the United States in *Soon Huig vs. Crowley*, 113 U. S., 705:

> "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discriminations can be said to impair that equal right which all can claim in the enforcement of the laws."

And again in *Barbier vs. Connelly*, 113 U. S. 27:

> "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated is not within the Amendment."

"Section 6 of the Act of 1889, providing that no officer or seaman, of a sea-going vessel or ship shall be arrested or imprisoned for debt, etc., is not in conflict with Section 20 of the Bill of Rights, which provides that no law shall be enacted granting to any citizen or class of citizens any

privilege or immunity which upon the same terms shall not equally belong to all citizens."

Re. Fred. Oberg, Oregon, Supreme Court. 14 L. R. A., 577.

The immunity here granted, if any, is immunity from arrest from debt. Any person who is a sailor may enjoy this immunity, and any citizen desiring to injoy such immunity may have it in the words of the constitution "upon the same terms" by becoming a sailor. This belongs to that class of exceptions that are made in all States to certain classes of persons, not so much for the benefit of the persons themselves, as for the benefit of the community which needs their services.

I quote from the decision of the Kentucky Court of Appeals in *Louisville Safety Vault Co. vs. L. & N. Ry. Co.*, 14 L. R. A., 584:

> "It is well settled that a corporation is 'a person' within the meaning of the Fourteenth Amendment to the United States Constitution; that it is entitled to the equal protection of the laws; and that no State can to any extent deny it. *Santa Clara County vs. Southern Pac. R. R. Co.*, 118 U. S., 396 (and citing other decisions). But this constitutional provision does not affect the police power of the State, which is to be exercised for the protection and safety of its citizens. It was not the purpose of the Constitution to disarm the State of the power to guard the public safety * * * It will be noticed, however, that the statute in question does not give a right of action merely against railroad corporation, but it applies to each proprietor of a railroad, whether operated by an individual, partnership, or corporation. It applies not merely to corporations operating railroads, but to all persons operating them."

It is the undoubted rule that State legislation is not ob-

noxious to the Fourteenth Amendment of the Constitution of the United States, if all persons subject to it are treated alike under similar circumstances and conditions in respect both to the privileges conferred and the liabilities imposed.

*Missouri Pac. Ry. Co. vs. Mackey*, 127 U. S., 209.

And cases cited under Point III.

I submit that, *upon principle*, there exists, in present civilization, and in the present state of affairs in this country, sound reasons in favor of making such statutes not applicable to agricultural products or live stock, while in the hands of the producer or raiser.

Anti-trust statutes are enacted in recognition of the fact that *the resistless drift and trend of the present times is toward combinations and centralization of money and the money power; toward the creation and perpetuation of a few billionaires.* RESULTING IN DRIVING, NOT ONLY THE POORER CLASSES TOWARD GREATER POVERTY, **but in driving the great middle class of enterprising and independent citizens, the hope of every country and especially the hope of every republic, into positions of dependency upon such billionaires, thus converting the entire country into a number of billionaires on one hand, and their employees and dependants, on the other, and thus discouraging and defeating individual ambition and individual independence and enterprise, in every direction.**

One necessary effect of this recognized *trend* is that the producers of agricultural products and raisers of live stock are being pushed more and more toward positions of dependency, tenantry and employees. To counteract this, so far as can be done reasonably, is clearly the duty af every

legislature; one method of counteracting it is to permit co-operation, and, if need be, combinations, *by everybody* in the protection of agriculturalists and stock-raisers, while their products remain in their hands.

This statute does not merely permit the agriculturalists and stockholders to co-operate but permits *everybody* so to do. If the statute permitted agriculturalists and stockholders to do all the acts prohibited in the statute, then, indeed, a serious question would be presented as to the constitutionality of the statute. But this is not what the statute attempts.

In short, these statutes of Illinois are enacted in recognition of the need of legislative restraints against the inevitable trend of the times toward and in favor of money and the money power; AND IN FURTHER RECOGNITION OF THE FACT THAT SUCH TREND, INSTEAD OF BEING IN FAVOR OF AGRICULTURAL PRODUCTS AND LIVE STOCK IN THE HANDS OF THE PRODUCER OR RAISER, **is against them, and, therefore, needs no restraint in that direction, but, if anything, needs encouragement.**

It is submitted that these *alleged* discriminations, in these statutes, are well founded and reasonable, and exist *in principle*, in the present state of modern civilization, and are, therefore, *not* special legislation, or otherwise open to objection on constitutional grounds.

## IV.

BECAUSE ONE SECTION OF THE STATUTE IS UNCONSTITUTIONAL, IT DOES NOT FOLLOW THAT THE OTHER SECTIONS OF THE SAME ACT, WHICH ARE WITHIN THE POWER GIVEN BY THE CONSTITUTION, SHOULD NOT BE ENFORCED. EVERY PRESUMPTION IS IN FAVOR OF THE CONSTITUTIONALITY OF A LEGISLATIVE ENACTMENT.

Assuming for the purposes of this decision that Section 9 of the Act of 1893, referred to herein, is unconstitutional, and, therefore, void, it does not follow that the whole act falls to the ground. The objection urged against Section 9 of the Act of 1893, is not urged against any other section of the said Act. Section 9 may be eliminated from the Act, and the residue of the Act be readily, properly and intelligently enforced, and the settled law is, that when constitutional and unconstitutional provisions in a statute are distinct and seperable, the valid provisions may stand as though the invalid provisions had not been introduced therein. Plaintiffs' in error cases are in no way founded on or connected with said Section 9 of the Act of 1893.

If the defendant in error is a trust in violation of Sections 1 of the Act of 1891, and the Amendatory Act of 1893, then the only other section of said Act concerned in Section 6 of the Act of 1891, exempting purchasers of commodities produced or manufactured in violation of the said Act from payment, which was reinacted in Section 10 in the Amendatory Act of 1893.

Section 9 of the Act of 1893, would have no application to the case at bar, as it is in no way invoked or relied on by the plaintiffs' in error.

In support of this proposition, see authorities cited under "Point IV," *supra*.

Pursuing the same argument: The Act of 1893, was amendatory and supplemental to the Act of 1891, by adding to it two new sections and reinacting the others without any clause repealing the law of 1891. It follows that if the entire amendment was declared unconstitutional, the Act of 1891, would still be in force, and the *said Act of 1891 contains the two sections (1 and 10) upon which the defense in the suit at bar is based.*

It is also submitted that when an act is done under the provisions of a statute, some of which are void and others valid, it will be presumed to have been done without reference to the void or unconstitutional provisions, unless there is something clearly indicating to the contrary. The courts will not only uphold a statute as far as it is possible to be done without violence to the constitution, but will also uphold whatever has been done under or in pursuance of said statute, so far as the acts done appeared to be within the provisions of the valid portions of the statute.

Where the unobjectionable portion is distinct and complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of the portion which is invalid, the former will be upheld.

For authorities in support of above propositions see those cited under "Point IV," "*a*," *supra*.

The unconstitutionality of a statute must be clear and manifest before a court should declare it, so that where any reasonable doubt exists as to its constitutionality, it should be upheld.

Invalidity must be plain—United States.

*Cooper vs. Telfair*, 4 Dall. (U. S.), 18,

And numerous State decisions cited in foot note, page 1085, Volume 6, American and English Encyclopedia of Law.

The law now on the statute books protects the great and growing commerce of this State. Under these circumstances courts should hesitate to pronounce a law unconstitutional, but should solve every reasonable doubt in favor of its validity, and that is what the authorities require.

Cooley Const. Limit, 182.

See also on this point, authorities cited under "Point IV," "*b*," *supra*.

In conclusion of my argument on the constitutionality of these statutes, I reiterate *that these statutes have already been declared constitutional by the Supreme Court of the State of Illinois;* that they have been attacked on all sides and proved invulnerable. I do not know that anything need be added to this statement. Its truth cannot be disputed, and the validity of the decision in this case is not therefore, debatable. Nothing can detract one iota from the binding force of the decisions of the courts of Illinois.

## V.

FEDERAL COURTS—STATE LAWS AND RULES OF DECISION—DECISIONS BINDING.

Where the Legislature has indicated a policy of the State that is the rule for the courts. In the State of Illinois the Legislature has declared its policy by the Anti-Trust and Anti-Monopoly Statutes. It is for the court to construe

these statutes as applicable to the case at bar and give effect thereto.

For a decision illustrating both sides of the binding force of State laws as rule of decision in Federal Courts I could not cite a better authority than *Burgess vs. Seligman*, 107 U. S., 33, Supreme Court, p. 10. The Supreme Court declared as follows:

> "The Federal Courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules or property *and action in the State, and have all the effect of law, and which it would be wrong to disturb.* This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal Courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence.
>
> (NOTE. The law is settled in this State by the decisions in *Ford vs. Milk Shippers' Association*, 155 Ill., 166, and *Harding vs. American Glucose Co.*, 182 Ill., 551.")

## VI.

### EXERCISE OF THE POWER OF ANNULMENT.

A question involving the constitutionality of a statute should be determined only when it is impossible to dispose of a cause on its merits otherwise, and a court will be especially reluctant to investigate or determine the constitutionality of a statute on preliminary motions.

*Ex. P. vs. Randolph*, 2 Brock (U. S.) 447.

See also foot-notes of decisions of statutes on this question on page 1084, Vol. VI., Am. and Eng. Ency. of Law.

There were other questions involved in the trial of this case below, for instance there was a claim of set-off for breach of contract arising out of the subject-matters of the suit (which I present under a different argument VII *infra*) which was clearly a matter for the consideration of the jury, but this was disregarded entirely, and the graver question passed on, and a statute declared unconstitutional which had already been declared valid by the Supreme Court of the State that passed it.

## VII.

### OTHER QUESTIONS INVOLVED.

*Set-off and counter claims of plaintiffs in error stricken out on motion, and relied on as grounds of reversal in this case. Assignments of error XII and XIII.*

The plaintiffs in error were large dealers in sewer pipe in the city of Chicago, handling almost exclusively the commodity known as Standard Akron Pipe in their business, and for that reason dependent upon the Akron manufacturers for their supply of pipe (Trans., pp. 172-173-141;

Rec., pp. 561-562-488.) In fact Standard Akron Pipe was used exclusively by the city of Chicago in public sewers from about 1873 until 1896 (Trans., p. 141; Rec., p. 488.) and both plaintiffs in error were engaged in the business of supplying the city of Chicago with this grade of pipe for public sewers. At the time of the formation of the Union Sewer Pipe Company, William E. Dee had entered into a contract with Camp & Thompson, one of the constituent members of the Union Sewer Pipe Company to purchase 308 carloads of pipe for to supply contracts the said Dee had already entered into (Trans., p. 141; Rec., p. 488), and Thomas Connelly being under like obligations to supply pipe entered into a similar contract with the same parties to purchase 200 carloads of the said Standard Akron pipe (Trans., p. 179; Rec., p. 570.) Both contracts were assumed by the Union Sewer Pipe Company after Camp & Thompson entered into agreement and subsequently carried out at an increase of 5 per cent. over the contract price (Trans., p. 152.) Plaintiffs in error attempted to prove this on the trial of the case for the purpose of recouping damages to the extent of the said over-charge, but the court would not allow them to do so. (Trans., pp. 143-144-145; Rec., pp. 490-491-492.) The court subsequently admitted this evidence solely for the purpose of showing whether or not the defendant in error was a monopoly, and for no other purpose. (Trans., pp. 146-150; also Trans., p. 176; Rec., p. 560.) (As to rulings of court along same lines in case of Thomas Connelly, see Trans., pp. 178-179-180-181; Rec., pp.570-571-572-573.)

In theThomas Connelly claim for set-off the defendant in error at one time offered him $2.000 in settlement of the claim against the defendant in error, which he refused.

claiming the full amount of his damages (Trans., pp. 180-181; Rec., p. 573.)

In this set-off, if testimony was allowed to be given, William E. Dee would show actual damages sustained by breach of this contract, made up of the overcharge of 5 per cent. on 308 car loads of pipe, of $28 per car, or in all $8,624, and Thomas Connelly would show like damages arising in the same way amounting in all to $5,600, both amounts being largely in excess of the amounts claimed from them by the defendant in error, and for which defendant in error recovered judgment.

Witnesses produced and sworn for the defendant in error testified concerning these transactions. See testimony of Harry Thompson (Trans., p. 125; Rec., p. 360), Horace B. Camp (Trans., pp. 99-116; Rec., p. 236), E. M. Buell (Trans., p. 125; Rec., p. 360).

In addition to this there was the general claim for damages under the Act of Congress known as the Sherman Act, and which the court ruled in the *United States vs. Addyston Pipe & Steel Co.* (Vol. 85, Federal Rep., 273), created a right of civil action for damages in favor of persons injured by restraints of trade, such as appears in this case. The effect of the contract in this case was to restrain trade. As E. M. Buell says in his testimony (Trans., p. 125): "It shut off all competition from the Akron district." It raised the prices of sewer pipe 5 per cent. on all pipe shipped from the Akron district for three years, which additional and fictitious price the plaintiffs in error were compelled to pay, as the direct and inevitable cause of the combination known as the Union Sewer Pipe Company. Why, then, could they not recoup this amount in

damages in a cause of action arising out of and being connected with the subject-matter of the suit?

In the case at bar the court, on motion, struck out all notices of set-off and counter claim of plaintiffs in error although the same were legitimate subjects of set-off and counter claim. (Trans., p. 49; Rec., p. 86.)

Where the defendant in an action on a contract seeks to recoup damages arising from the plaintiffs' breach of the contract, it is immaterial that the damages alleged by the defendant are unliquidated.

*Harlan vs. St. Paul, etc., Ry.*, 31 Minn., 427, and cases cited under "a," "Point VII.," *supra*.

On the trial of an action in which a set-off or counter claim has been pleaded, the case stands as though two separate suits were brought to determine the rights of the parties, and in reality two suits are pending before the court to be tried at the same time!

*Merchants Bank vs. Schulenberg*, 54 Mich., 49.

See, also,

Point "b," "VII.," *supra*.

Where a counter claim pleaded by the defendant and the plaintiffs reply thereto raises issues of fact, these issues should be tried by a jury, and a motion by the plaintiff for judgment on the pleadings should be refused.

*Wilson vs. Hughes*, 94 N. Car., 182.

[NOTE.—*The motion was granted in the case at bar.*]

## VIII.

AMENDMENT OF PLEADINGS WHEN NECESSARY TO PRESENT AN ISSUE ON THE MERITS, NOT DISCRETIONARY, BUT A LEGAL RIGHT.

The court erred in not permitting plaintiffs in error to amend their notices of set-off and defenses attached to plea of general issue—assignment of error III.

The plaintiffs in error offered to file an amended notice of set-off which the court would not permit (Trans., p. 51; Rec., pp. 91-92-93-94), which amended notice of set-off is set out fully in assignment of error III. herein. See also (Trans., pp. 242-243; Rec., p. 702.)

The statute of "*amendments and jeofails*" of the State of Illinois, is found on page 144 of the Revised Statutes, and was enacted especially to cover such cases as this. Section 1 of said statute reads as follows:

> "Power of the court to permit amendments. That the court in which an action is pending shall have power to permit amendments in any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as may be just, at any time before judgment rendered therein."

The application here was made before the trial of the case (Trans., p. 51; Rec., p. 91.) and was in furtherance of justice, as everything in the amendment offered to be filed showed a substantial matter of defense and a legitimate and proper subject of set-off and counter-claim.

Answer containing demand for affirmative relief by way of set-off or counter-claim are amendable. The same is true of pleas in recoupment, notices of set-off or recoupment accompanying the general issue.

*Fontaine vs. Bayley*, 90 Ga., 416.
And cases cited under Point VIII, *supra*.

Under Illinois statute, court should allow all formal and technical objections to be obviated by amendment.

*Drake vs. Drake*, 83 Ill., 526.

Not to allow any formal amendment bringing merits before the court is abuse of discretion.

*Shufeldt vs. Fidelity Bank*, 93 Ill., 597.
*Kirkpatrick vs. Cooper*, 77 Ill., 565.

Leave to amend pleadings when necessary to present an issue on the merits, not discretionary, but a legal right. "Just and reasonable terms" mean such terms as were reasonably required at common law.

*Empire Co. vs. Trust Co.*, 1 Ill. App., 391.

## IX.

THE PLAINTIFF IN ERROR, WILLIAM E. DEE, SEPARATELY ASSIGNS AS ERROR THAT THE COURT ERRED IN PERMITTING PROOF OF INDEBTEDNESS FROM SAID DEE TO THE UNION SEWER PIPE COMPANY AFTER THE DEFENDANT IN ERROR HAD CLOSED ITS TESTIMONY AND DURING REBUTTAL.

After all the testimony was in for defendant in error the court allowed it to prove its account against William E. Dee, which was a part of its direct case, and should have been done on direct examination.

(Trans., p. 223; Rec., p. 666.)

## X.

### OTHER QUESTIONS INVOLVED IN ASSIGNMENT OF ERRORS AND NOT SPECIFICALLY ARGUED.

Each of the errors assigned is relied upon as a ground of reversal, and any errors not specifically argued here are covered in the argument of other errors. For instance, the exclusion of the deposition of the Attorney-General of the State of Ohio ("Point X") as to the defendant being a trust under the laws of Ohio, and admissions made by its officers (Rec., pp. 431 to 435,) goes to the question of the defendant in error being a combination in restraint of trade, and if the statute of Illinois is valid ("Point III"), the same would be competent evidence; if not, the testimony would avail nothing. I ask the consideration of this question by the court with other questions involved.

## XI.

### IN CONCLUSION OF ARGUMENT.

Permit me to say in conclusion, that the acts and facts and circumstances disclosed in this case *show a deliberate and wilful and intentional violation of every one of our statutory provisions* by every member of the Union Sewer Pipe Company, defendant in error, jointly and severally, *for all and every of the very purposes expressly prohibited and declared illegal and criminal by such statutes.* The evidence shows how and why that the necessary effect and deliberate purpose and intent of all those instrumental in organizing the Union Sewer Pipe Company, in doing it, was to accomplish and bring about absolute control of prices of standard Akron sewer pipe, and control of sup-

plies, etc., in violation of every single provision of the statutes of Illinois and the Federal statutes.

Compare the contract between the Union Sewer Pipe Company and its constituent companies (Trans., p. 128; Rec. , p. 397), with that declared in restraint of trade in *United States vs. Addyston Pipe & Steel Co.* (Vol. 85, Fed. Rep. 271), and the latter is not as binding and restraining as the former; besides, the monopoly was not by any means as complete.

All this was practically admitted by counsel for defendant in error on trial of case in court below (See argument of counsel, Trans., p. 144), but it is and will be contended, that notwithstanding all that, that plaintiffs in error cannot set up a defense on the grounds of public policy, or to enforce the laws of the State.

It is not true that the plaintiffs in error are seeking merely to enforce *public rights* or to enforce a criminal statute. They have *vested property rights*, which were damaged and affected directly and against their objections by the acts complained of. Plaintiffs in error have been directly damaged by the failure of defendant in error to carry out a contract—William E. Dee to the amount of $8,624, and Thomas Connelly to the amount of $5,600—and also as the direct and proximate result of the combination of the defendant in error as a trust, pool and combination, in violation of the statutes of Illinois and the United States, has suffered other damages by being compelled to pay an increased price for their goods, largely in excess of their real market value, for upward of two years. Therefore, these plaintiffs in error are not here seeking to enforce public rights, or seeking to punish criminals, but they are here seeking ONLY *to protect and enforce their rights*, and,

*in doing so*, THEY HAVE THE RIGHT TO RELY ON AND CLAIM THE BENEFIT OF THE ENTIRE BODY OF THE COMMON LAW, AND EVERY STATUTE APPLICABLE, IN WHOLE OR IN PART, TO THE FACTS AND CIRCUMSTANCES DISCLOSED.

Plaintiffs in error were not permitted to make any defense, outside of to show the defendant in error to be a monopoly in restraint of trade. This they did. All their other matters of defense were excluded; and it should not be forgotten that there was no finding of a single fact set up by plaintiffs in error in their special defenses against them, by the trial court, or any attempt by that court to consider or find the facts, or allow the jury to do so. *The court simply found the statute upon which the defenses of the plaintiffs in error was founded to be unconstitutional*, sweeping away the defenses, and refused to consider other matters of substantial defense on the merits of the case.

The issue involved here is one which goes to the very foundation of government. If corporations, creatures of the Legislature, have arrived at such a state of power and superiority to the law that they cannot be controlled and cannot be restrained and reached in any natural or reasonable way by legislative enactment, it is high time that such fact be ascertained. The framers of the Constitution and the people who have lived under the Constitution never expected or intended that its provisions should be a shield and protection to great public wrongs and oppressions. No greater service can be rendered to the State of Illinois than to treat this anti-trust law according to its spirit and intent, and to hold that all corporations within the borders of and doing business in this State are subject to its control and regulation.

Upon this argument of the facts and the review of the law and authorities, I respectfully submit that the judgment of the court below should be reversed, and that such direction be given that full force and efficiency may inure to the plaintiffs in error, and each of them, by reason of the defenses set up in their special notices of defenses, and in their notices of set-offs attached to and filed with their pleas in this cause and all amendments to such notices.

Respectfully submitted,

HENRY D. COGHLAN,

*Attorney for Plaintiffs in Error.*

JOSEPH A. O'DONNELL, ESQ.,

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*Of Counsel.*

Off[illegible]e Court U.S.
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JAMES H. McKENNEY
Clerk

Filed April 8, 1901.

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 259.

THOMAS CONNOLLY,
*Plaintiff in Error,*
*vs.*
UNION SEWER PIPE COMPANY,
*Defendant in Error.*

WILLIAM E. DEE,
*Plaintiff in Error,*
*vs.*
UNION SEWER PIPE COMPANY,
*Defendant in Error.*

In Error to the Circuit Court of the United States for the Northern District of Illinois.

## MOTION TO DISMISS WRITS OF ERROR
AND
## BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

HERBERT HAMLIN,
Attorney for Defendant in Error.

EDWIN WALKER,
of Counsel.

BARNARD & MILLER, PRINT.

IN THE

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In Error to the Circuit Court of the United States for the Northern District of Illinois.

## MOTION TO DISMISS WRITS OF ERROR.

*Comes now the defendant in error, by its counsel appearing in that behalf, and moves the court to dismiss the writs of error in the above entitled causes for want of jurisdiction, because the Circuit Court of Appeals for the Seventh Circuit has exclusive jurisdiction to review by writ of error the judgments entered by the Circuit Court in the above entitled causes.*

HERBERT HAMLIN,
*Attorney for Defendant in Error.*

EDWIN WALKER,
*of Counsel.*

## BRIEF IN SUPPORT OF MOTION TO DISMISS WRITS OF ERROR.

Writs of error were allowed direct to this court upon the petition of the learned counsel for plaintiffs in error, presumably for the alleged reason that it is shown by the record that a law of the State of Illinois is in contravention of the Constitution of the United States.

In their notice of special defenses the defendants charged that the plaintiff was a trust, and doing business as such in the State of Illinois and elsewhere, contrary to the provisions of an Act of the Legislature of the State of Illinois, entitled, "An Act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void, and making certain acts and violations thereof misdeameanors and prescribing punishment thereof and matters connected therewith, approved June 20th, 1893." (Trans. p. 34.)

Each of the defendants plead this act "in defense to this action and the whole thereof." This statute is a part of the Criminal Code of the State of Illinois. It is under the tenth and last section of the act that the defendants interpose their special defense, to wit: "Any purchaser of any article or commodity, from any person, firm, corporation or association of persons, or of two or more of them, transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment."

In support of plaintiff's motion that the jury be directed to return a verdict against the defendants, several causes were assigned. The eighth is as follows:

"The Statute of the State of Illinois, of 1893, is unconstitutional and void. It is prohibited by the constitution of the State of Illinois of 1870. It is prohibited by the Fourteenth Amendment of the Constitution of the United States as being special legislation. It has not the essential principles of equality, as required by said Constitution."

A further, and the principal cause assigned was that, "under all the evidence and proceedings in this case, the defendant has not made good its defenses and therefore the verdict of the jury should be for the plaintiff." (Trans., pp. 204-5.)

The court in its opinion, which is printed in the record (pp. 228-9), held that the act of 1893 was in contravention of both the Federal and State Constitutions.

While we admit that the claim was made in the Circuit Court that the Statute of 1893 was invalid under the Constitution of the United States, we respectfully submit that the claim so made was not controlling, nor was the ruling of the court thereon at all decisive of the rights of the parties.

The defense made by the defendants in the Circuit Court was threefold. First: That the plaintiff was a trust combination of the capital of divers persons and corporations, carrying on business in the States of Ohio and Illinois in the manufacture and sale of certain articles of merchandise; that the action was brought to recover the price of such articles of merchandise, and that such trust combination was contrary to the common law.

Second: That the plaintiff was a combination in the form of a trust in restraint of trade and commerce among several states, contrary to the provisions of the Act of

Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and that the action was brought to recover the price of certain articles of merchandise sold to the defendant by the plaintiff, then and there doing business as such combination, in violation of the provisions of said act.

Third: That the plaintiff was an organization of certain persons and corporations contrary to the Statute of the State of Illinois of July, 1893, and that the action was brought to recover the price of certain articles of merchandise sold to the defendant by the plaintiff, and said act is pleaded as a defense to the entire cause of action.

It is true that the court held against the defendants upon each of the legal propositions, and it is equally true that the court would have reached the same conclusion if the validity of the State Statute had not been incidentally challenged as in contravention of the Constitution of the United States. It would, therefore, seem that under the decisions of this court the writs of error should be dismissed.

We will cite but few authorities in support of our motion.

*Carey* v. *Railway Company,* 150 U. S., 170.

This was a motion by the appellee to dismiss the appeal. The court, speaking by the Chief Justice, said:

> "The Judiciary Act of March 3, 1891, in distributing the appellate jurisdiction of the national judicial system between the Supreme Court and the Circuit Court of Appeals therein established, designated the classes of cases in respect of which each of these courts was to have final jurisdiction, (the judgments of the latter being subject to the supervisory power of this court through the writ of *certiorari* as provided) and the act has been uniformly so construed

> and applied as to promote its general and manifest purpose of lessening the burden of litigation in this court."

Also (p. 181):

> "In order to hold this appeal maintainable as within the second of the above named classes (the fourth class in the enumeration of the statute), the construction or application of the Constitution of the United States must be involved as controlling, although on error all other questions would be open to determination, if inquiry were not rendered unnecessary by the ruling on that arising under the Constitution."

In *Cook County* v. *Canal & Dock Co.*, 138 U. S., 653, the court held that:

> "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

In *Green* v. *Mills*, 69 Fed. Rep., 857, it was contended by the appellee that the Circuit Court of Appeals had not jurisdiction, for the reason that, under the law, the appeal should have been taken directly to the Supreme Court. After citing several cases as bearing upon the direct question involved, the Circuit Justice said:

> "In view of these and other cases, we are of opinion that where the jurisdiction is not in issue, but the question of the constitutionality of a state law is raised, and must necessarily be decided in the disposition of the case, there the case on final decree should be taken direct to the Supreme Court."

In the present cases the question of the constitutionality of a state law, as being in contravention to the Federal Constitution, was not necessarily involved in the disposition of the case—this question was neither controlling nor necessary. Had the Circuit Court entirely eliminated

this question from its opinion, the result would have been precisely the same.

*Louis Loeb, Plff. in Error,* v. *Trustees of Columbia Township, etc.,* decided at the present term of court and reported in the Advance Sheets, Number 5, p. 174, appears to be the latest authority bearing upon the question under discussion. The suit was upon bonds issued by the Township for the purpose of raising money to meet the cost of widening and extending a certain avenue within its limits. The petition was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action against the Township. In the argument upon the demurrer three points were made and decided by the court. The first and second were ruled in favor of the plaintiff. The third, as stated in the opinion, is as follows:

> "That the act contravened the provisions of the Constitution of the United States, and therefore the bonds were invalid."

Upon this proposition the court held with the defendant and sustained the demurrer. The plaintiff electing not to plead further, judgment was rendered for the defendant. It is stated in the opinion that "the first question to be considered is one of the jurisdiction of this court to proceed upon writ of error directly to the Circuit Court." The controlling question in the court below was the invalidity of the state statute as in contravention of the Federal Constitution, under the authority of which the bonds in controversy were issued. This was the sole ground for sustaining the demurrer and dismissing the petition. As affecting the jurisdiction of this court, it was asserted by the defendant in error that the record did not show that the claim of the invalidity of the State Statute was made in the Circuit Court, except as it ap-

peared in the opinion of the court, and that such opinion was no part of the record. After a full consideration of this proposition, and the citation of many cases, the court, speaking by Mr. Justice HARLAN, said:

> "For the reasons we have given, it must be held that in a case brought here from the Circuit Court the opinion regularly filed below and which has been annexed to and transmitted with the record, may be examined in order to ascertain, in cases like this, whether either party claimed that a state statute upon which the judgment necessarily depended in whole or in part was in contravention of the Constitution of the United States."

This opinion would seem to be in harmony with *Carey* v. *Railway Company,* 150 U. S., *supra,* in which this court held that, to maintain the jurisdiction of this court, by direct appeal or writ of error, it must appear that the construction or application of the Constitution of the United States must be involved and, necessarily, controlling.

Upon the motion of the defendant in error the three matters of special defense were stricken out, and, while it is true that the Circuit Court held that the Statute of Illinois of 1893 was invalid, as being in contravention of the Constitution of the United States, this by no means was the controlling reason in the mind of the court. Upon other grounds, and for other causes, the court entered an order striking out the special defenses and directing the jury to return a verdict in favor of the plaintiff.

Defendant in error, therefore, respectfully submits that the writs of error in these respective cases should be dismissed.

HERBERT HAMLIN,
*Attorney for Defendant in Error.*

EDWIN WALKER,
*Of Counsel.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 259.

THOMAS CONNOLLY,
*Plaintiff in Error,*
*vs.*
UNION SEWER PIPE COMPANY,
*Defendant in Error.*

WILLIAM E. DEE,
*Plaintiff in Error,*
*vs.*
UNION SEWER PIPE COMPANY,
*Defendant in Error.*

In Error to the Circuit Court of the United States for the Northern District of Illinois.

## STATEMENT OF CASE.

At the March Term, A. D. 1897, of the Circuit Court for the Northern District of Illinois the Union Sewer Pipe Company, a corporation organized under the laws of the State of Ohio, commenced its two several actions in assumpsit against the plaintiffs in error, Thomas Connolly and William E. Dee. The cause of action against Thomas Connolly was upon two promissory notes, the one dated December 15, 1894, and the second January 15, 1895. The action against William E. Dee was for goods sold and delivered in the month of July, 1896. The declarations were in the usual form in actions in assumpsit, with affidavit of the amounts due in accordance with

the procedure in such cases in the State of Illinois. The defendant, Connolly, filed his plea of general issue, with notice of special defenses.

(1) That the plaintiff was organized for, and was a trust combination or monopoly contrary to the provisions of the common law.

(2) That the plaintiff was a trust, combination, or corporation, contrary to the Federal Statutes of 1890.

(3) That said plaintiff was a corporation organized for the purpose of carrying on a trust or monopoly, contrary to the Statutes of the State of Illinois of 1893, and that therefore all its contracts are illegal and void.

Defendants also filed notices of set-off—

(1) Treble the amount of the actual damages sustained, allowed by Act of Congress dated June 2, 1890, in the aggregate.....$56,970.41

(2) For actual damages sustained by the defendant by reason of the plaintiff's violation of the Statute of the State of Illinois.....$17,323.48

(3) For money had and received by plaintiff of the defendant, contrary to law, the same amount.

The defendant, William E. Dee, also filed his plea of general issue with notices of special defenses, substantially the same as those interposed by the defendant, Connolly.

In the bill of particulars of set-off, filed by this defendant, he claims:

(1) Treble the amount of the actual damages under the Act of Congress of June 2, 1890.....$76,340.00

(2) Actual damages sustained by reason of the plain-

tiff's violation of the Anti-trust Act of the Legislature of the State of Illinois.....$23,780.00

The causes came on for hearing January 22, A. D. 1900. By stipulation in open court both causes were submitted to one jury, separate verdicts to be returned, and with the further stipulation that, if either party should desire a bill of exceptions, the same evidence might be used as a bill of exceptions in each and in both cases.

The Union Sewer Pipe Company was organized under the laws of the State of Ohio, but its constitution and by-laws are omitted from the record, and there is no written evidence of the object and purpose of the organization of the corporate body.

On or about the 15th day of February, 1893, said company contracted with several corporations and copartnerships engaged in the manufacture of sewer pipe, for the purchase and sale of all the pipe manufactured by said parties for a term of years expiring the last day of December, 1900. The manufacturers agreed to make and keep in stock at their respective works a good and sufficient supply of socket and ring pipe, and to deliver the same to the Union Sewer Pipe Company free on board of cars at their respective factories. The price and manner of payment of the pipe delivered under the contract, are fixed and determined by the terms thereof. The Union Company agreed to order the pipe as fast, and in such manner, and at such times, as the demands of the market may require. There is no other limitation put upon the product of the several factories, and the Union Company is at liberty to sell the pipe at the best prices obtainable in the market. A full copy of the contract is

made a part of the transcript of record (pp. 128 to 132, inclusive).

Prior to 1893 both of the plaintiffs in error had for many years been dealing in sewer pipe in the city of Chicago, and elsewhere in the State of Illinois. During a part of the time Connolly was both a manufacturer and dealer. Their purchases of pipe were not confined to the manufactories in the Akron district, but it appears that they bought and sold pipe made in other localities, and by other manufacturers. After its organization their purchases of the Akron pipe were made exclusively of the Union Sewer Pipe Company, but the terms and conditions of their purchases prior to August 20, 1895, does not appear in the evidence.

On the 20th day of August, A. D. 1895, each of the plaintiffs in error entered into written contracts with the Union Sewer Pipe Company. The contracts were alike in all their terms, provisions, and conditions. The Union Sewer Pipe Company agreed to sell and deliver free on board of cars at its factories, sewer pipe of different sizes and dimensions, at prices named in said contracts. Plaintiffs in error, and each of them, in consideration of the prices named and certain rebates to be allowed, agreed to purchase and handle exclusively the sewer pipe "handled and sold" by the defendant in error, except when it was unable to furnish and fill all the orders for sewer pipe that the plaintiffs in error might from time to time require. These sales were made upon certain discounts of the Western price list specially noted in the contract, and the plaintiffs in error also agreed to sell the pipe in the city of Chicago at certain discounts from said Western price list. It was further provided that the contract might be terminated by either party upon

thirty (30) days' written notice. Copy of this contract is made a part of the transcript (pp. 149, 150).

In this contract no reference is made to any particular brand of pipe, nor is it confined to pipe manufactured within the "Akron District," but, on the contrary, the contract is for any pipe "handled and sold" by the Union Sewer Pipe Company.

It is claimed by the plaintiffs in error that by reason of the specifications required by the Department of Public works of the City of Chicago in all contracts for the construction of public sewers, no pipe could be received, except "standard Akron pipe," and that all other brands and makes of pipe would be rejected. It is in evidence, however, that defendant's witness, William D. Kent, was appointed commissioner of public works early in the year 1895, and that he immediately caused tests to be made at the University of IIllinois of the quality of the several kinds of sewer pipe then in market in the city of Chicago, and that as a result of such tests it was found that the pipes of seven or eight different manufacturers were of equal quality and value, and thereupon he gave directions that either of such brands of pipe should be thereafter used in the construction of public sewers. It appears further from the evidence of the plaintiff in error, Connolly, that prior to this time, as a matter of fact, several other kinds of pipe were of equal quality with the Akron pipe, and that the preference shown the Akron pipe, was the result of a combination between dealers and inspectors. Also, that for years preceding and following the organization of the Union Sewer Pipe Company, other than Akron pipe had been used in the construction of public sewers in the city of Chicago, notably, a large amount of pipe from the Columbus Ohio factory, which was not in the Akron district.

The action against plaintiff in error, Thomas Connolly, was brought upon two promissory notes given by him to the Union Sewer Pipe Company, but there is no evidence in the record that these notes were given for Akron, or any other brand of pipe. The consideration for which these notes were given nowhere appears in the record.

The action against plaintiff in error, William E. Dee, is upon an open account for goods sold and delivered in the month of June, A. D. 1896. The claim made by this plaintiff in error that he could dispose of no other pipe than that of the Akron brand in the city of Chicago, after the execution of his contract of 1895, is contrary to the evidence. As the contract provided for its termination upon thirty (30) days' notice, he could at any time after its execution have given the notice, and thereafter purchased pipe of whomsoever he pleased, and of any brand or make. He admitted on the trial that the pipe for which this action was brought was delivered to him under the contract, and that he had sold and disposed of the same, and it appears that no defense whatever was interposed in either of the cases, except that the Union Sewer Pipe Company was an unlawful combination contrary to the common and statutory law of the State of Illinois.

At the close of the evidence, upon the request of the plaintiff, the court charged the jury to return a verdict for the plaintiff in each action, and thereupon verdicts were returned, and judgments entered, in favor of the plaintiff. An order was entered of record allowing the defendants to prosecute jointly a writ of error to this court, and to "prosecute said writ of error jointly upon the one record of said consolidated causes."

Believing that the writs of error should have been taken

to the Circuit Court of Appeals, the defendant in error has filed in each case, its motion to dismiss the writs of error.

If this motion be denied, then it follows, under the ruling of this court, that "all other questions will be open to determination," and we therefore submit our brief and argument upon the entire record.

# BRIEF.

## I.

THERE IS NO EVIDENCE IN THE RECORD THAT THE PLAINTIFF IS OR HAS BEEN, SINCE THE FIRST DAY OF JANUARY, 1893, AN UNLAWFUL COMBINATION OF DIVERS PERSONS AND CORPORATIONS, ORGANIZED FOR THE PURPOSE OF UNLAWFULLY "CARRYING OUT RESTRICTIONS IN TRADE CONTRARY TO THE COMMON LAW, OR CONTRARY TO THE PROVISIONS OF THE ACT OF CONGRESS OF JULY 2, 1890, ENTITLED: 'AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRICTIONS AND MONOPOLIES, OR CONTRARY TO THE ACT OF THE LEGISLATURE OF THE STATE OF ILLINOIS, ENTITLED: AN ACT TO DEFINE TRUSTS AND CONSPIRACIES AGAINST TRADE, ETC.,' APPROVED JUNE 20, 1893," AS CHARGED IN DEFENDANTS' NOTICES OF SPECIAL DEFENSES.

## II.

THE CIRCUIT COURT DID NOT ERR IN SUSTAINING PLAINTIFF'S MOTION TO STRIKE OUT THE DEFENDANTS' NOTICES OF SET-OFF.

(a) Unliquidated damages, growing out of a tort, cannot be set off in an action *ex contractu*.

(b) Defendants' bill of particulars of set-off, filed under order of court, is for treble damages under the Federal Statute of July 2, 1890, and for damages by reason of plaintiff's alleged violation of the Statute of the State

of Illinois, of July 1, 1893, defining trusts and conspiracies. (Trans., p. 38.) The claim of such damages is not permissible either as a defense, or set-off, to the plaintiff's demand.

*Robison* v. *Hibbs,* 48 Ill., 408.
*Hubbard* v. *Rogers,* 64 Ill., 434-7.
*Evans* v. *Hughey,* 76 Ill., 115.
*Clause* v. *Bullock Printing Co.,* 118 Ill., 612.
*United States* v. *Buchanan,* 8 How., 83.
*Dushane* v. *Benedict,* 120 U. S., 630-48.
*Scammon* v. *Kimball,* Circuit Court, N. D. of Illinois, 5 Biss., 431.

## III.

THE CIRCUIT COURT DID NOT ERR IN DIRECTING THE JURY TO RETURN A VERDICT FOR THE PLAINTIFF.

(a) The contracts of the defendant in error with the several manufacturers of sewer pipe in the "District of Akron" and with the plaintiffs in error, respectively, are not inhibited by the Act of Congress of July 2, 1890, entitled: "An Act to protect trade and commerce against unlawful restraints and monopolies."

(b) There is nothing in the evidence to indicate any intention to put a restraint upon trade or commerce among the several states.

(c) It does not appear that any agreements or contracts made by the defendant in error, and relating to the conduct of its business, are in restraint of inter-state commerce.

*U. S.* v. *E. C. Knight Co.,* 156 U. S., 1.
*Addyston Pipe & Steel Co.* v. *U. S.,* 175 U. S., 211.
*Hopkins* v. *U. S.,* 171 U. S., 578.
*In re Green,* 52 Fed. Rep., 113.

(d) The Statute of the State of Illinois, entitled: "An Act to define trusts and conspiracies against trade," approved June 20, 1893, does not impair the validity of the contract between the parties.

1. Defendant in error is a corporation, organized under the laws, and is a citizen of the State of Ohio. The contract for the sale of the sewer pipe was made in the State of Ohio, and the property was delivered to plaintiffs in error free on board of cars at Akron, Ohio, and therefore the Statutes of the State of Illinois cannot be plead as a defense. The title to the property passed from the vendor to the vendee on delivery.

Parsons on Contracts, page 754.
*Adams* v. *Coulliard,* 102 Mass., 167.
*Roundtree* v. *Baker,* 52 Ill., 241.
*Schlee* v. *Guckenheimer,* 179 Ill., 593-7.
*Liverpool Steamship Co.* v. *Insurance Co.,* 129 U. S., 397.

2. The Act of 1893 defines trusts, conspiracies, etc., but does not forbid, or prohibit the entering into, or forming such trusts or conspiracies. Nothing is prohibited, or commanded therein, and therefore there can be no violation thereof.

The State Statute of 1893 is void as being in contravention of Article 2, Section 2, of the Constitution of the State of Illinois.

*Ritchie* v. *People,* 155 Ill., 98.
*Harding* v. *People,* 160 Ill., 459-64-65.
*Braceville Coal Co.* v. *People,* 147 Ill., 66-70.
*Millett* v. *People,* 117 Ill., 294.
*Frorer* v. *People,* 141 Ill., 171.
Cooley on Constitutional Limitations, Sec. 393.

State legislation of this character is also inhibited by the Fourteenth Amendment to the Constitution of the United States.

*Smyth* v. *Ames*, 169 U. S., 522.
*Duncan* v. *Missouri*, 152 U. S., 377-82.
*Railway Co.* v. *Ellis*, 165 U. S., 150.
*Yick Wo* v. *Hopkins*, 118 U. S., 356-73.
*Ex parte Virginia*, 100 U. S., 339-44.
*In re Grice*, 79 Fed. Rep., 627-39-41.

## IV.

IT IS NO DEFENSE TO AN ACTION FOR GOODS SOLD AND DELIVERED, THAT PLAINTIFF IS A MEMBER OF AN ILLEGAL TRUST OR COMBINATION TO INTERFERE WITH THE FREEDOM OF TRADE AND COMMERCE, SINCE THE ILLEGALITY OF THE COMBINATION IS COLLATERAL TO THE CONTRACT OF SALE, AND CANNOT TAINT IT WITH ILLEGALITY, OR MAKE IT CONTRARY TO PUBLIC POLICY.

*National Distilling Co.* v. *Cream City Importing Co.*, 56 N. W. Rep., 864.
*Brooks* v. *Martin*, 2 Wallace, 70-81.
*Planters Bank* v. *Union Bank*, 16 Wallace, 483-99.
*Dennehy* v. *McNulta*, 86 Fed. Rep., 825-29.
*Jackson et al.* v. *Bricklayers Assn.*, 53 Ohio, 308.
Greenhood on Public Policy, Rule 108 and 109.
*Norton* v. *Blinn*, 39 Ohio St., 145.
Bishop v. American Preserver Company
157 Ills. 284 - 330.

## V.

**UNDER ALL THE EVIDENCE AND PROCEEDINGS IN THESE CASES, THE COURT DID NOT ERR IN DIRECTING THE JURY TO RETURN A VERDICT FOR THE PLAINTIFF.**

(a) It is shown by the evidence, that but six manufacturers of sewer pipe became interested in the organization of the Union Sewer Pipe Company and entered into contracts for the sale of their product, out of the seventy-five to one hundred corporations and copartnerships engaged in the same business in the several states.

(b) That the product of the six constituent manufacturers was not reduced in quantity, nor was the market price increased.

(c) That the defendant in error did not, and could not control the market price of the product, either in Chicago, or elsewhere—there were several other manufacturers in competition with the defendant in error in all the markets.

(d) The contracts between the defendant in error and the manufacturers within the "Akron District," did not operate either in restraint, or partial restraint of trade, nor did they amount to a conspiracy between the parties, to control prices, by creating a monopoly.

*Oregon Steam Navigation Co.* v. *Windsor*, 20 Wallace, 64.
*Gibbs* v. *Baltimore Gas Co.*, 130 U. S., 396-405.
*Dolph* v. *Troy Laundry & Machinery Co.*, 28 Fed. Rep., 553.
*In re Green*, 52 Fed. Rep., 104.
*Coquard* v. *National Linseed Oil Co.*, 171 Ill., 484.
*Brown* v. *Rounsavell*, 78 Ill., 589.
*Lynn* v. *Sigsbee*, 67 Ill., 80.
*Hursen* v. *Gavin*, 162 Ill., 377-82.
*Cook* v. *Meyers*, 166 Ill., 289.

Anson v. Iron & Steel Summary 113 Ill. 618-630

## ARGUMENT.

### I.

THERE IS NO EVIDENCE IN THE RECORD THAT THE PLAINTIFF IS OR HAS BEEN, SINCE THE FIRST DAY OF JANUARY, 1893, AN UNLAWFUL COMBINATION OF DIVERS PERSONS AND CORPORATIONS, ORGANIZED FOR THE PURPOSE OF UNLAWFULLY "CARRYING OUT RESTRICTIONS IN TRADE CONTRARY TO THE COMMON LAW, OR CONTRARY TO THE PROVISIONS OF THE ACT OF CONGRESS OF JULY 2, 1890, ENTITLED: 'AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRICTIONS AND MONOPOLIES, OR CONTRARY TO THE ACT OF THE LEGISLATURE OF THE STATE OF ILLINOIS, ENTITLED: 'AN ACT TO DEFINE TRUSTS AND CONSPIRACIES AGAINST TRADE, ETC.,' APPROVED JUNE 20, 1893," AS CHARGED IN DEFENDANTS' NOTICES OF SPECIAL DEFENSES.

On the 15th day of December, A. D. 1894, the plaintiff in error, Thomas Connolly, made and executed his certain promissory note whereby he promised to pay the Union Sewer Pipe Company, ninety (90) days after date, the sum of $1,850.36 at the First National Bank, city of Chicago; also on the 15th day of January, A. D. 1895, his certain other promissory note for the sum of $1,289.56, payable to the defendant in error ninety (90) days after date. (Trans., p. 56.) For the recovery of the amount due upon said notes, this action was brought. The execution of the notes was admitted and their validity is not challenged either by special pleas or evidence.

The action against plaintiff in error, William E. Dee, is in assumpsit for goods sold and delivered. Prior to the trial the plaintiff by leave of court amended its declaration by striking out the special count and substituting therefor the common counts. (Trans., p. 42.)

On the trial the defendant admitted the receipt of goods to the whole amount of the claim, to wit: $2,389.26. (Trans., 60-1.) All of the goods were delivered in the month of June, 1896.

On the 20th day of August, A. D. 1895, each of the plaintiffs in error entered into a certain written contract with the defendant in error, full copies of which are made a part of the transcript (pp. 148 and 176). The "Union Sewer Pipe Company, City of Akron, County of Summit, and State of Ohio," is made party of the first part, and the plaintiffs in error, respectively, party of the second part. By the terms of the contract, the party of the first part agrees to sell and deliver to party of the second part sewer pipe free on board cars at its factories at certain discounts of the Western Price List.

The party of the second part agrees to purchase and handle exclusively the sewer pipe handled and sold by the party of the first part, except when said party is unable to furnish and fill the orders for sewer pipe that they, the second party, may make. The party of the second part does not agree to purchase or receive any given amount of sewer pipe, nor are they required to accept any amount whatever. No particular brand or quality of pipe is specified, but only the pipe "handled and sold by the party of the first part." It is further provided that either party may terminate the contract upon thirty days' written notice. This contract was put in evidence by the

plaintiffs in error, and its validity is conceded. It is not tainted with the virus of unlawful combination or monopoly.

Plaintiffs in error also put in evidence a certain contract between the defendant in error and certain manufacturers of sewer pipe in the vicinity of the city of Akron, State of Ohio. (Trans., 128-132.) By the terms of this contract the manufacturers agree to sell to the Union Sewer Pipe Company, as party of the second part, all the sewer pipe manufactured by the party of the first part between the 15th day of February, 1893, and the 31st day of December, 1900, and to keep in stock at its works a good and sufficient supply of pipe of the various kinds specified in the price list, and to promptly fill all orders of said second party, and to deliver said pipe without delay free on board cars at the works of the first party.

The second party agreed to order said pipe as fast and in such manner as the demands of the market might require. The method of filling and distribution of orders are explicitly stated in the following clause of the contract:

> ("Whereas, the said second party has entered and may hereafter enter into contracts with other manufacturers of sewer pipe for the purchase of sewer pipe, all of whom, together with said first party, are located in Ohio, and are hereinafter called "manufacturers") the said second party in its orders and arrangements for the delivery of pipe aforesaid shall in good faith and as far as practicable in a business way act and be governed as follows, to wit: Beginning February 15, 1893, said first party each succeeding month until July 1, 1893, shall, as near as practicable, be given such per cent. of the aggregate amount of orders placed by said second party in that

respective month as the product of said first party for the month immediately preceding is of the aggregate product of said manufacturers for said preceding month; said first party shall, as near as practicable, be given such per cent. of the aggregate amount of orders placed by said second party in the six months beginning July 1, 1893, and ending December 31, 1893, both inclusive, as the product of said first party on hand February 15, 1893, and manufactured during the four and a half months, beginning February 15, 1893, and ending June 30, 1893, both inclusive, is of the aggregate product of said manufacturers on hand February 15, 1893, and manufactured during said four and a half months ending June 30, 1893; said first party, in the six months beginning January 1, 1894, and ending June 30, 1894, shall, as near as practicable, be given such per cent. of the aggregate amount of orders placed by said second party in said six months as the product of said first party for the six months, beginning July 1, 1893, and ending December 31, 1893, is of the aggregate product of said manufacturers for said six months; said first party, in the six months, beginning July 1, 1894, and ending December 31, 1894, shall, as near as practicable, be given such per cent. of the aggregate amount of orders placed by said second party in said six months as the product of said first party for the six months beginning January 1, 1894, and ending June 30, 1894, is of the aggregate product of said manufacturers for said six months; for the remaining period of time covered by this contract said first party shall be given such per cent. of the aggregate amount of orders placed by said second party for said remaining period as the product of said first party for the last six months of 1894 is of the aggregate product of said manufacturers for said six months."

Under Article 7 the second party agrees to pay for all pipe delivered under the contract, according to its size and quality, from eight per cent. to fifteen per cent. of the

Western List prices, with its promissory notes, payable in ninety days from the date thereof.

> "And, in addition to the prices above specified said second party further agrees to pay in cash to said first party such a share of any excess that may remain after deducting from the amount realized by said second party for said sewer pipe the prices above specified, and all expense of managing and conducting the affairs and business of said second party, as the amount of sewer pipe delivered by said first party to said second party under this contract shall bear to the whole amount of sewer pipe delivered to said second party by all the manufacturers of sewer pipe under contracts with said second party similar to this contract."

There are several other articles, but immaterial to the defenses interposed in these actions.

The evidence discloses that in the so-called "Akron District" there were six or seven different manufacturers of sewer pipe, but it is not definitely shown how many of these concerns, as a matter of fact, entered into the contract with the defendant in error. But, for the purpose of argument, we will assume that all of the manufacturers of sewer pipe at Akron, respectively, became parties to the contract. The articles and the object and purpose of the incorporation of the defendant in error are not in evidence, but it must be assumed that the Union Sewer Pipe Company had corporate authority under the laws of the State of Ohio to purchase, sell, and deal in sewer pipe.

Plaintiffs in error in the court below urged that the direct and immediate effect of these contracts was to destroy competition, increase prices, and were, as a matter of fact, in restraint of trade, and that by reason thereof plaintiffs in error were greatly injured and damaged in the regular prosecution of their business.

It was said by this court in *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S., 245, that:

> "All the facts and circumstances are, however, to be considered in order to determine the fundamental question whether the necessary effect of the combination is to restrain inter-state commerce."

Plaintiffs in error bring to this court by bill of exceptions over 600 typewritten pages of evidence, and the parts printed cover about 177 pages of the transcript. The responsibility for this record containing so large a volume of unnecessary and immaterial evidence must rest with the plaintiffs in error. For the convenience of the court, we file herewith an abstract of the printed evidence offered by the defendant, bearing upon this particular issue, and the plaintiff's evidence in rebuttal.

It was claimed by the plaintiffs in error that during the time in controversy, the pipe manufactured in the "Akron District" differed in quality from pipe manufactured elsewhere and was known, especially in the Chicago market as "Standard Akron pipe," and that as a matter of fact, no other pipe would be received by the municipal authorities of the city of Chicago in the construction of public sewers. In support of their contention, they called as witness David E. Hill, the president, and also other officers of the Union Sewer Pipe Company. All of these witnesses testified that the word "standard" referred to the thickness of the pipe; that some of the firms in Akron adopted the name of "Standard Akron sewer Pipe" with an idea that they had a better grade of pipe than some others. It is also in evidence that during this time there were seventy-five or eighty other companies in the country manufacturing standard pipe of equal quality in all respects with the Akron pipe, and

that some fifteen or twenty other manufacturers were competitors of the defendant in error in the Chicago and other western markets—that the defendant in error did not, and could not, at any time control the market price of sewer pipe, either in Chicago or elsewhere—that the price at all times depended upon the condition of the market.

The undisputed evidence is, that after the organization of the Union Sewer Pipe Company, there was no decrease of production, no closing of factories, and no advance of price. As a matter of fact, from the organization of the company in 1893, covering the entire period in controversy, there was a gradual reduction of the market price of sewer pipe in the Chicago market, and elsewhere. The organization of the Union embraced but a small part of the factories of sewer pipe in the State of Ohio. There was an organization known as the Central Company, controlling many factories on the Ohio river, with annual sales 50 per cent. greater than those of the Union Company. There was also a large manufactory at Columbus, and others located elsewhere. All these companies were competitors of the Union Company in the Chicago market, and were prior to January, 1893. During the entire period there were also several manufactories of sewer pipe in the States of Illinois, Missouri, Minnesota and Michigan, all of which were also competitors in the Chicago market.

The benefits derived under the contracts with the Union Sewer Pipe Company resulted from increased economy in the prosecution of the business of the several manufacturers. There was a reduction in the number of traveling sales agents, clerical employes, and especially

in the amount of stock of manufactured pipe that the parties were theretofore compelled to keep, that they might be enabled to fill any and all orders that they should receive. These matters are explained in detail by the witnesses called on behalf of the defendants.

It was also claimed by the plaintiffs in error that under the specifications issued by the municipal authorities of the City of Chicago, no pipe could be received in the construction of public sewers, except "Standard Akron pipe," but the evidence does not support this claim.

The action against William E. Dee is for the recovery of money due for pipe sold and delivered to him during the month of June, 1896, and it appears from the evidence of William E. Kent, a witness called by the defendants, that he was appointed Commissioner of Public Works of the City of Chicago early in 1895. That believing there was a combination between the sewer pipe dealers and contractors in the city, whereby but one particular brand of pipe should be used, he caused certain tests to be made, which resulted in establishing the fact that there were several brands of pipe in the market at Chicago of equal quality and value for the construction of public sewers, and thereupon he directed that either of such brands of pipe should be received and accepted. This test was made in the summer of 1895, and thereafter the Akron pipe had no advantage over other pipe in the market.

The contracts between the plaintiffs in error and the Union Sewer Pipe Company were executed on the 20th day of August, 1895, and at that time the Akron pipe had no monopoly in the City of Chicago, and certainly none when the pipe in controversy was sold and delivered to the plaintiff in error, William E. Dee.

Relative to the claim against Connolly, and his defense, we repeat that this action was brought upon two promissory notes, the first executed and delivered in December, 1894, and the second in January, 1895. The execution of these notes was admitted, and no defense of failure or partial failure of consideration was interposed. Notices of special defenses and set-off were filed, but there is no evidence in the record that the notes were given for sewer pipe sold and delivered by the payee. The notes were executed prior to the date of the contract between the parties of August, 1895, and the record is entirely silent as to the consideration for which the notes were given.

Plaintiffs in error also claimed that at the date of the contract between the defendant in error and the several manufacturers, they each had a contract with the firm of Camp & Thompson for the delivery of several hundred cars of sewer pipe at 80 per cent. of the Western scale of prices. Plaintiff in error, Dee, claimed that his contract was for 308 cars, but on his direct examination, he testified that he had no agreement with the Union Sewer Pipe Company "in reference to these 308 cars." That after the organization of the Union Sewer Pipe Company he had a conversation with Mr. Hill, the President of the company, relative to the delivery of those cars.

"Q. Was there any talk in that interview about their assuming the contract of Camp & Thompson?

"A. They denied the assumption. Mr. Hill denied the assumption of this contract." (Trans., 151.)

Upon cross-examination, plaintiff in error testified that at the same interview Mr. Hill informed him that he would see Mr. Camp about the contract. That after-

wards, at a subsequent interview, Mr. Hill informed him that Camp denied the contract, and he gave that as a reason for not assuming it.

Plaintiff in error, Connolly, also testified that in December, 1892, he made a contract with Camp & Thompson, for 200 car-loads of city inspected pipe to be delivered during the year 1893 at the price of 80 per cent. off of Western price list, but there is no evidence that the defendant ever assumed this contract. Objections were made by the plaintiff to the admission of this evidence, as being inadmissible under the pleadings. In the notices of special defenses and set-off, no reference is made to these contracts, or to their assumption by the defendant in error, and this part of the defense was practically abandoned.

Out of this evidence, counsel for plaintiffs in error have attempted to build up an unlawful monopoly, prejudicial in its operation to the public interests, and contrary to both the common and statutory law.

Whatever may have been the purpose of the promotors in the organization of the Union Sewer Pipe Company, its existence as a *de jure* corporation, with full authority to purchase, sell and deal in sewer pipe, was not denied by the plaintiffs in error, and this being so, its legal existence cannot be attacked collaterally, either for the purpose of annulling its charter, or for the purpose of depriving it of the protection of the courts, in the possession, use, and enjoyment of its property.

The contracts between these respective parties are in all respects valid and obligatory; the notes are impressed with a sufficient legal consideration, and the sewer pipe in controversy was delivered in accordance with the terms

of the contract of August 15, 1895, except at prices less than the contract price. The contract was entered into more than two years after the organization of the defendant in error, and the plaintiffs in error had full knowledge of the purpose and objects of the incorporation. There was neither fraud nor compulsion in its procurement, and the plaintiff in error, Dee, having received the benefit of the contract, and having accepted and disposed of the pipe sold and delivered to him under and by the terms of the contract, there would seem to be no good reason, either in law or equity, why he should be relieved from payment.

The Circuit Court held that even if it should be found that the defendant in error was in fact a monopoly, and that its contracts with the several manufacturers were invalid under the common law as being in restraint of trade, such fact could not be plead by the defendants in error as a defense to these actions. The court said:

> "The fact that one party to a contract is engaged in illegal acts will not, at common law, avail the other party as a defense to the enforcement of a contract in itself legal."

We respectfully submit that the court here announced a correct rule of law, and that there is no evidence in the record that the plaintiff is or was an unlawful combination or monopoly in restraint of trade, contrary to either the common or statutory law.

## II.

THE CIRCUIT COURT DID NOT ERR IN SUSTAINING PLAINTIFF'S MOTION TO STRIKE OUT THE DEFENDANTS' NOTICES OF SET-OFF.

(a) Unliquidated damages, growing out of a tort, cannot be set off in an action *ex contractu.*

(b) Defendants' bill of particulars of set-off, filed under order of court, is for treble damages under the Federal Statute of July 2, 1890, and for damages by reason of plaintiff's alleged violation of the Statute of the State of Illinois, of July 1, 1893, defining trusts and conspiracies. (Trans., p. 38.) The claim of such damages is not permissible either as a defense or set-off to the plaintiff's demand.

These are penal statutes, and the rule is, in courts of both state and federal jurisdiction, that in actions for goods sold and delivered, the defendants may set off claims in the nature of assumpsit, but not claims sounding in tort.

In *Robison* v. *Hibbs*, 48 Ill., 408, the court held:

> "That unliquidated damages, growing out of tort, cannot be set off in a suit disconnected with such claim under the statutes."

The action was brought by the plaintiff to recover a balance of account, and the defendant sought to set off damages resulting from alleged trespasses of the appellant's hogs. The court said:

> "We are aware of no law which authorizes the unliquidated damages growing out of a tort to be set off in an action *ex contractu.*"

Nor are such damages subject of recoupment.

In *Hubbard* v. *Rogers,* 64 Ill., 434, the court held that:

> "To be the subject of recoupment, the defendant's claim must arise out of the cause of action involved in the plaintiff's suit."

Again, in another action of assumpsit brought to recover for services and commissions in making sale of certain real estate, it appeared that the plaintiff in negotiating a sale of the lands by authority of the defendant took from the purchaser a mortgage to secure the payment of a part of the purchase money. That the defendant was a non-resident, and that the mortgage was left with the plaintiff to be placed on record. That the plaintiff neglected to have the mortgage recorded until about a year after its execution, and in the meantime certain judgments against the mortgagor became liens upon the property, which the defendant was compelled to discharge. As a defense to the action, he sought to recoup as damages the amount he was compelled to pay.

The court said:

> "We are of the opinion that whatever recovery Evans (the defendant) may be entitled to on account of his alleged damage, must be sought in a distinct suit, and can in no way be set up in the present action, as it is something not growing out of the contract sued upon. To be subject of recoupment, the defendant's claim must arise out of the cause of action involved in the plaintiff's suit."
>
> *Evans* v. *Hughey,* 76 Ill., 115, 120.

And in this court the same rule, so far as we are advised, has always prevailed.

*U. S.* v. *Buchanan,* 8 How., 84, was an action brought by the United States against Buchanan, who was a pur-

ser in the navy, to recover a balance alleged to be due by him. The defense was that he was entitled to certain credits which accounting officers of the government had refused to allow. The District Judge allowed the evidence given in support of the set-off to go to the jury, but this court held that the District Court "erred in law by permitting a set-off composed of such a claim to go to the jury at all." In passing upon this defense, this court said:

> "The statute of March 3, 1797, which allows set-offs, has had a very liberal construction by this court, extending it to matters even distinct from the cause of action if only such as the defendant is entitled to a credit on, whether equitable or legal. * * *
>
> "The object is to settle between the parties their mutual accounts or debts. * * *
>
> "But any wrongs or torts done, and any unliquidated damages claimed, have never been permitted as a set-off. * * *
>
> "This rule prevails when the United States are plaintiffs, as well as individuals."

Also in *Dushane* v. *Benedict*, 120 U. S., 630-48.

This was an action of assumpsit by Benedict, a rag dealer at Pittsburg, Pennsylvania, against Dushane, to recover for rags sold and delivered. The defendants pleaded payment with a notice of special matters of defense, and claimed damages in the sum of $7,000 in excess of the amount sued for by the plaintiff. In the notice of special defense facts were stated tending to show a warranty of the rags on the part of the plaintiff, and also a breach of the warranty, and the defendant claimed the damages resulting from the breach. At the close of the evidence, upon the request of the plaintiff, the court charged the jury, that, "Upon the whole case, the court

instructs the jury to find a verdict for the plaintiff for the amount of his claim." A verdict was returned for the plaintiff in accordance with the instruction and the case was brought to this court by writ of error.

In the opinion of the court, by *Mr. Justice Gray*, the general rules of law and decisions of state courts were considered and reviewed. The court held, that in an action for the price of goods sold or work done, the defendant might set up a breach of warranty or a false representation as to the goods, or a defective performance of the work by way of recoupment of the sum that the plaintiff might recover, but held that, if the defendant "failed to prove a warranty, express or implied, the statute can have no application, because it extends to no claim sounding in tort only, etc."

The Circuit Court applying these thoroughly recognized rules of law to the evidence in the case and to the facts, so far as they are alleged in the special notices of defense and set-off, sustained the plaintiff's motion to strike out, and rejected defendants' claims of set-off, and by so doing, the Circuit Court avoided the error of the District Court in *U. S.* v. *Buchanan, supra.*

## III.

THE CIRCUIT COURT DID NOT ERR IN STRIKING OUT THE FIRST, SECOND AND THIRD SPECIAL DEFENSES, INTERPOSED BY THE DEFENDANTS. THEY ARE FATALLY DEFECTIVE IN SUBSTANCE.

The first special defense charges that the plaintiff is a trust or combination of capital and skill of divers persons and corporations, carrying on a commercial business

in the States of Ohio and Illinois, contrary to the common law of said states. With the notices of special defense the defendants also filed "notice of set-offs," but it does not appear that any damages were claimed under the first special defense, or plead as a set-off. Before the trial, the court entered a rule requiring the defendants "to file bill of particulars in support of defendant's plea of set-off," and in accordance with the rule, bill of particulars was filed on the 27th day of September, 1898. (Trans., 14.) Under the first set-off defendants claim treble the amount of actual damages under act of Congress of July 2, 1890.

Under the second, defendants claimed damages by reason of plaintiff's violation of an act of the legislature of the State of Illinois of July 1, 1893.

The third set-off is but a restatement of the second claim of set-off. We therefore assume that claim for damages under the first special defense was abandoned.

However this may be, we insist that the Circuit Court in disposing of the plaintiff's motion to strike out the first special defense, stated the rule of law applicable thereto accurately and concisely.

The court said:

> "As to the matters set out in the first notice of special defense, it is undoubtedly true that by the common law, contracts, which are themselves directly in restraint of trade may, in a proceeding based thereon, be declared void and unenforcible by the courts; but there is no case brought to the attention of the court in which it has been held that at common law a contract not in itself in restraint of trade, is void because one of the parties thereto is a party to a contract which is in restraint of trade, and the one contract is indirectly based upon the other.

> The fact that one party to a contract is engaged in illegal acts, will not, at common law, avail the other party as a defense to the enforcement of a contract in itself legal."

This ruling of the court is directly supported in principle by several of the authorities hereafter cited.

The second and third special defenses are stated in the notice as follows:

> "Secondly: That the plaintiff is and at all times since the first day of January, 1893, was a combination in the form of a trust in restraint of trade and commerce among the several states and doing business as such throughout the United States, and between the States of Ohio and Illinois, contrary to the provisions of an act of Congress of date July 2, 1890, and entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and that this action is brought solely to recover the price of articles of merchandise, to wit: sewer and drainage pipes sold to the defendant by the plaintiff, then and there acting and doing business as such a combination, as aforesaid, in violation of the provisions of said Act."
>
> "Thirdly, That the plaintiff is, and at all times since the first day of January, 1893, was a trust, and doing business as such in the State of Illinois and elsewhere, contrary to the provisions of an act of the Legislature of the State of Illinois, entitled 'An Act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void, and making certain acts and violations thereof misdemeanors and prescribing punishment thereof, and matters connected therewith, approved June 20, 1893; in force July 1, 1893;' that this action is brought solely to recover the price of articles of merchandise, to wit: sewer and drainage pipes, sold to defendant by plaintiff, then and there acting and doing business in violation of the provisions of said act, and that the defendant hereby pleads said act in defense to this action and the whole thereof." (Trans., 34.)

We have referred to the transcript of record in the case against Connolly. The record in the case against Dee does not differ in the slightest particular. It will be observed that Connolly claims in his third special defense "that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes sold to the defendant by the plaintiff, then and there acting and doing business in violation of the provision of said act, and that the defendant hereby pleads said act in defense to this action and the whole thereof, the same as if he had specially pleaded thereto."

The facts are that the action was not brought against Connolly to recover the price of merchandise, etc., but upon his promissory notes, executed and delivered to the defendant in error.

These notices of special defense were filed under section 28 of the Practice act of the State of Illinois, to wit:

> "The defendant may plead as many matters of fact in several pleas as he may deem necessary for his defense, or may plead the general issue, and give notice in writing, under the same, of the special matters intended to be relied on for a defense on the trial; under which notice, if adjudged by the court to be sufficiently clear and explicit, the defendant shall be permitted to give evidence of the facts therein stated, as if the same had been specially pleaded and issue taken thereon."

This statute requires the defendant to give notice of the facts that he relies upon as a defense, and these facts must be clearly and explicitly stated; otherwise, the notice is insufficient and may be stricken out by the court. The notice given is not a compliance with this statute; the facts are not stated, but simply the conclusion of the pleader.

This statute has been in force since 1845, and has been brought to the attention of the Supreme Court in very many reported cases.

In *Sherman* v. *Dutch*, 16 Ill., 283 (1855), the Supreme Court said:

> "Notice of special defense, accompanying the general issue, stands in place of a special plea, and fills the same office. If the matter set up by the notice is not a good defense in law, it amounts to nothing; no proof can properly be given under it, and if given, cannot avail the defendant, nor under the general issue and a bad notice, can the defendant give in evidence, in defense of the action, any matter, that by the rules of the common law, should be specially pleaded."

Also in *Hinrichsen & Rothschild* v. *Mudd & Hughes*, 33 Ill., 480, the court held that it was no error for the court to enter an order striking an insufficient notice of a special defense from the files.

The Supreme Court of Illinois has invariably held that a notice of special defense stands in the place of a special plea and in either case, the facts relied upon must be concisely stated, as in *Bailey* v. *Valley National Bank*, 127 Ill., 332.

On page 338, the court said:

> "The purpose of the provision, now the 28th section, was to relieve the defendant of pleading specially new or affirmative matters relied upon as a defense. He is to be permitted to give evidence of the facts therein stated, as if the same had been specially pleaded and issue taken thereon. The system of common law pleading is repeatedly recognized by the Practice Act, and was the recognized mode of procedure when these provisions were first enacted, and has been so ever since. A plea then had, as it now has, a recognized legal meaning, and

well defined characteristics and requisites, and the several species of pleas performed a well understood legal office. A special plea, introducing new matter, did not deny the plaintiff's cause of action, but set up the defense, by way of confession and avoidance. It is manifest, that by the provisions of section 28, matters of fact constituting a legal defense to the action, instead of being set forth, as at common law, by special plea, may be stated in a notice under the general issue and evidence of such facts given on the trial, with like effect as if the same had been specially pleaded. But although the notice given under the general issue has this effect, no reply, either of admission or denial, of the plaintiff, is required, or permissible thereto, and no issue, either of law or of fact, can be raised thereon. (See *Burgwin* v. *Babcock,* 11 Ill., 28; *Hunt* v. *Weir,* 29 *id.,* 83). If the facts stated in the notice are immaterial, and which, if true, would constitute no legal defense, the plaintiff cannot demur, and thus raise and have determined the question of their sufficiency. All that such notice can be held to do, is to relieve the defendant of the necessity of pleading specially any facts not provable under the general issue, which he may rely upon at the trial, and to introduce evidence in their support, if material and explicitly stated, as if the same had been specially pleaded. The court must determine the materiality of the facts stated, and on the trial, my exclude from the jury, or admit, evidence tending to support the defense."

In *Jones* v. *Albee,* 70 Ill., 34, a suit brought to recover on a promissory note, the defendant filed a special plea of fraud in the procurement of the note, to wit:

> "Defendant avers that the plaintiff caused and procured the defendant to enter into the said agreement, and endorse the said note, and promise as in the said declaration alleged, and the defendant was induced to enter into and make the said agreement and promise, and endorse said note through and by means of the fraud, covin and misrepresentation of the plaintiff, and others in collusion with him."

To this plea a demurrer was filed and sustained by the court. The Supreme Court said:

> "This plea cannot be sustained by any well settled authority on pleading. If the defendant desired to rely on fraud, the facts constituting fraud should have been set out in the plea. This we understand to be a well settled rule of pleading."

In this court, also, the invariable rule is, that in special pleas, facts must be plead instead of conclusions of law, as in *Chicot County* v. *Sherwood,* 148 U. S., 529.

The usual test is, "Would the facts as alleged in the notice have been good upon general demurrer had they been specially pleaded?"

As no facts are alleged in either of the notices, they are fatally defective in substance. The motion to strike out is to be treated as a demurrer, and it would have been error had the court denied the motion.

## IV.

IT IS NO DEFENSE TO AN ACTION FOR GOODS SOLD AND DELIVERED, THAT PLAINTIFF IS ALLEGED TO BE AN ILLEGAL TRUST OR COMBINATION TO INTERFERE WITH THE FREEDOM OF TRADE AND COMMERCE, SINCE THE ILLEGALITY OF THE ALLEGED COMBINATION IS COLLATERAL TO THE CONTRACT OF SALE, AND CANNOT TAINT IT WITH ILLEGALITY, OR MAKE IT CONTRARY TO PUBLIC POLICY.

This defense cannot be pleaded either under the common law, or the Federal Statute of 1890, and if permissible at all, it must be under the Illinois statute of 1893, pleaded by the defendants in general terms as a defense.

We shall attempt to show later on that this state statute is invalid, as in contravention of the state and fed-

eral constitutions, and that even if valid, it cannot prejudice the claim of the plaintiff for goods sold and delivered to the defendant in the State of Ohio.

Similar defenses under much stronger evidence than appears in this record have been interposed in other courts, but uniformly rejected. On the trial of the case at bar defendants offered in evidence the case of *Jackson et al.* v. *Brick Association,* 53 Ohio, 303.

This was an action brought by the Akron Brick Association, claiming to be a partnership, against Lyman Jackson *et al.,* as defendants, to recover for certain brick furnished sub-contractors on the order of the defendants.

The defendants denied that the plaintiff was a partnership, and as a defense specifically averred "that said Akron Brick Association, so-called, is not in fact a lawful partnership, but that said alleged partnership is a combination of all or nearly all, of the several brick manufacturers and dealers in and about the City of Akron, and that the object of the copartnership was to control and enhance the price of brick and to prevent and do away with open competition in market."

It will be observed that this was a controversy between citizens of the State of Ohio in a suit brought to recover on a contract for goods sold and delivered within that state, and as a matter of course the laws of the State of Ohio had direct bearing upon the validity of the contract. On the trial the court charged the jury as follows:

> "In our jurisprudence it is no defense to say that the contract was made with a bad man, or with persons engaged in prosecuting acts contrary to law, or the policy of the state, unless the contract grows immediately out of and in connection with an illegal or immoral act. A clear distinction exists in law, as

well as ethics, between a contract entered into to do an unlawful or immoral act, or to promote a course of conduct contrary to the policy of the state, and a contract entered into for a legitimate purpose, though made with persons who commit unlawful and immoral acts, or promote schemes contrary to good policy."

The court directed a verdict, and relative to this direction the Supreme Court said:

> "We see no error in the court deciding the matter, nor in the law as stated by the learned judge: the error consists, as we think, in the application of it."

The Supreme Court, however, held that the plaintiff was not a legal copartnership under the laws and statutes of the State of Ohio, and therefore could not maintain an action in its copartnership name.

The Supreme Court further said:

> "This does not deny to the persons comprising the association the right, in their individual names, to maintain an action for the price of brick sold and delivered to a third person, or the enforcement of any contract that in no way depends upon the illegal arrangement as between themselves."

In this case the court was dealing with a copartnership instead of a corporation organized under and in pursuance of the statutes of that state, and was very careful in its opinion not to relieve the defendants from liability for the goods sold and delivered by the individual members of the copartnership.

Also, in *Norton* v. *Blinn,* 39 Ohio St., 145, it was held that—

> "While courts will not enforce an illegal contract between the parties, yet, if an agent of one of the parties has, in the prosecution of the illegal enterprise for his principal, received money or other

> property belonging to his principal, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction."

Under somewhat different facts, a similar defense was made for goods sold and delivered in Wisconsin, in the case of the *National Distilling Co.* v. *Cream City Importing Company,* 56 N. W. Rep., 864.

The complaint in this action was for a balance due for goods, wares and merchandise, to wit: alcohol, spirits, whisky, etc., sold and delivered to the defendant at its special instance and request. The defendants specially pleaded as a defense that the plaintiff, prior to the sale and delivery of the goods, entered into an agreement with divers firms and corporations residing in different states, for the purpose of forming a trust or conspiracy, for the further purpose of wrongfully interfering with the freedom of trade and commerce, so that it might acquire the full, absolute and complete control and monopoly of all alcohol, spirits and liquors manufactured in the United States, and the exclusive right to regulate, dictate and control the amount manufactured, etc., and that the defendant's business had been greatly injured by reason of said trust and its business methods, and also that the defendants were compelled to pay for all of said goods a price greatly in excess of their real value.

The plaintiff's motion to strike out this defense as irrelevant was denied by the court, with $10 costs. The plaintiff appealed. PINNEY, J., speaking for the court, said:

> "Taking the allegations of the first defense in their most liberal sense, it is apparent that they are irrelevant and have no legal relation to the controversy between the parties to the action, which is whether the plaintiff shall recover the demand set forth in its complaint. * * *

The first defense does not deny any allegation of the complaint, but the substance of it is that the sale and delivery of the goods in question to the defendant was void as against public policy, because the vendor was at the time a member of an unlawful trust or combination, formed to unlawfully interfere with the freedom of trade and commerce and in restraint thereof and to accomplish the ends therein set forth. * * * Conceding, for the purposes of this case, that the trust or combination in question may be illegal and its members may be restrained from carrying out the purposes for which it was created by a court of equity in a suit on behalf of the public, or may be subject to indictment and punishment, there is, nevertheless, no allegation showing or tending to show that the contract of sale between the plaintiff and defendant was tainted with any illegality, or was contrary to public policy. The argument, if any the case admits of, is that, as the plaintiff was a member of the so-called "trust," or "combination," the defendant might voluntarily purchase the goods in question of it at any agreed price, and convert them to its own use, and be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is in no legal sense dependent upon, or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination, created with the intent and purposes set forth in the answer, will not disable or prevent it in law from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. It does not appear that it had stipulated to refrain from such transactions. A contrary doctrine would lead to most startling and dangerous consequences."

The case was reversed and remanded.

The precise question received the consideration of the Circuit Court of Appeals for the Seventh Circuit in *Dennehy et al.* v. *McNulta,* 86 Fed Rep., 825.

In this case the defendant, McNulta, had been appointed receiver of the Distilling and Cattle Feeding Company, a corporation, organized under the statutes of the State of Illinois. The appellants filed claims for allowance against the funds of the court for the payment of certain rebate certificates or vouchers issued by the Distilling & Cattle Feeding Company to the appellants, aggregating a sum of more than $5,000. There was evidence that the Distilling & Cattle Feeding Company, as organized and conducted, was a combination of a large percentage of the distilleries of the country, asserted to be eighty-five per cent. thereof, constituting an illegal trust monopolizing and controlling the product of the country in that line to the extent of ninety per cent. The Circuit Court of Appeals held that—

> "The mere fact that the corporation as one of the contracting parties, may constitute and unjust monopoly, and that its general business is illegal—a status apparently held in *Distilling & Cattle Feeding Co.* v. *People,* 156 Ill., 448, cannot serve, *ipso facto,* to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any manner its independent contract obligations or rights." Citing *National Distilling Co.* v. *Cream City Importing Co., supra.*
>
> "In the case of an injurious combination of the nature asserted here, the remedy is by well recognized and direct proceedings; but one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination is illegal, or that its prices were unreasonable."

Also in *Brooks* v. *Martin,* 69 U. S., 70, this court held:

> "After a partnership contract confessedly against public policy has been carried out, and the money contributed by one of the parties has passed into other forms, the results of the contemplated operation completed, a partner in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract."

*Planters Bank* v. *Union Bank,* 16 Wallace, 483, was an action brought to recover the proceeds of the sale of Confederate Treasury notes and securities, and it was urged in defense that "no lawful or valid obligation could arise from the sale of bonds or securities of the Confederate government."

The court held that—

> "Although an illegal contract will not be enforced by courts, yet it is the doctrine of this court that where such a contract has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties under a promise express or implied, and the court will not unravel the transaction to discover its origin."

In the Circuit Court the defendants rested their entire defense upon the authority of *Ford* v. *Chicago Milk Shippers' Association,* 155 Ill., 166. In that case the plaintiff was a corporation, organized under the laws of the State of Illinois. All of the producers from whom the City of Chicago received its supply of milk were stockholders and members of the Association, and the object of the Association was to control the price, and the purchase and sale of milk to retail dealers within the limits of the City of Chicago. Ford was a retail dealer within the cor-

porate limits of the city and under contract with the Association received his supply of milk. The action was brought to recover balance of account. The state law of July 1, 1891, by special plea was plead as a defense. The court was dealing with a domestic corporation, and in the opinion said:

> "The rule is settled that corporations created within this state are amenable to the police power, and such bodies are not beyond legislative control, and are amenable to the same extent as natural persons."

Clearly, under this authority the jurisdiction of the court could not be extended to corporations organized in the State of Ohio, nor did the court hold or intimate that a contract executed and practically performed in another state, would not be enforced by the courts of the State of Illinois, by reason of any prohibition of the state statutes.

We assume that it will not be denied by plaintiffs in error that the laws of a state have *proprio vigore* no extra territorial force, or that the contract which is valid where it is made will be held to be valid everywhere. The contract between these parties of August, 1895, provided that the sewer pipe should be delivered to the plaintiff in error free on board of cars at the factories of the defendant in error, located in Akron, to be paid for at a subsequent date. The title to the property became vested in plaintiffs in error at the time of delivery, and they were at liberty to ship it to Chicago or elsewhere as they might elect.

The Milk Association case, *supra,* can be further distinguished from the case at bar in this—in that case the statute of 1891 was plead as a defense and it was the application of that statute to the contract between those

parties that the court considered and held to be a good defense, but in the case at bar the plaintiffs in error based their defense upon the state statute of 1893, and therefore, we insist that the case cited is in no manner controlling.

## V.

THE CONTRACTS OF THE DEFENDANT IN ERROR WITH THE SEVERAL MANUFACTURERS OF SEWER PIPE IN THE "DISTRICT OF AKRON," AND WITH THE PLAINTIFFS IN ERROR, RESPECTIVELY, ARE NOT INHIBITED BY THE ACT OF CONGRESS OF JULY 2, 1890, ENTITLED "AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES, ETC."

1. There is nothing in the evidence to indicate any intention to put a restraint on trade or commerce among the several states.

2. It does not appear that any agreements or contracts made by the defendant in error, and relating to the conduct of its business, are in restraint of inter-state commerce.

That the organization of the defendant in error, as disclosed by the evidence, is not a monopoly or restraint prohibited by the act of July 2, 1890, is not now an open question in this court.

*U. S.* v. *Knight Co.*, 156 U. S., 1, would seem to be not only decisive, but conclusive of this branch of the defense urged by the plaintiffs in error. In the first paragraph of the opinion by *the Chief Justice* it is said that the American Sugar & Refining Company, by reason of its purchases of other refineries, "acquired nearly complete

control of the manufacture of refined sugar within the United States," yet the court held that such monopoly bore "no direct relation to commerce between the states or with foreign nations," and that the act of July 2, 1890, did not forbid "a monopoly in the manufacture of a necessary of life."

And in this opinion it is further said:

> "The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly, and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it."

Also in *Hopkins* v. *U. S.*, 171 U. S., 592, it is said that—

> "The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate."

And in the late case of *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S., 211, while the court held that the direct effect of the agreement or combination under consideration was to regulate interstate commerce, it did not in any particular modify the opinion in the case of *U S.* v.

*Knight & Co., supra,* but on the contrary cited such case with approval.

The court, speaking by Mr. Justice PECKHAM, said that—

> "Where the contract affects interstate commerce only incidentally and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress. Otherwise, the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, interstate commerce, is of no importance."

Again:

> "It is almost needless to add that we do not hold that every private enterprise which may be carried on chiefly or in part by means of interstate shipments is therefore to be regarded as so related to interstate commerce as to come within the regulating power of Congress. Such enterprises may be of the same nature as the manufacturing of refined sugar in the *Knight case*—that is, the parties may be engaged as manufacturerers of a commodity which they thereafter intend at some time to sell, and possibly to sell in another state; but such sale we have already held is an incident to and not the direct result of the manufacture, and so is not a regulation of or an illegal interference with interstate commerce. That principle is not affected by anything herein decided." (p. 246.)

We confidently assert that the present case comes within this ruling.

## VI.

THE CONTRACTS BETWEEN PLAINTIFFS AND DEFENDANT IN ERROR IF NOT TO BE REGARDED AS CONTRACTS LOCAL TO THE STATE OF OHIO, ARE INTER-STATE TRANSACTIONS, AND CONSEQUENTLY, NOT SUBJECT TO THE REGULATION OF STATE LAWS.

The contracts involved in these cases were neither made nor performed in the State of Illinois. If the view heretofore advanced that they are local Ohio transactions be not upheld, then they must be regarded as acts of interstate commerce. The evidence shows the general contract of August, 1895 (Transcript, p. 148) was abrogated. The prices to be paid by its terms were uniformly higher than those charged for the goods sued for, as shown by Transcript (pp. 25-29 and 60-61), and admitted to be correct by plaintiff in error. The deliveries were specified to be in the State of Ohio (Transcript, pp. 67-8). No evidence was offered to show the place of making the Connelly notes. In the Dee case, orders for goods were sent by mail from Illinois to Ohio. (Transcript, p. 212.)

*Brown* v. *Maryland*, 12 W., 446.

MARSHALL, C. J., in this case said:

> "Commerce is intercourse; one of its most ordinary ingredients is traffic."

*Cooper Mfg. Co.* v. *Ferguson*, 113 U. S., 727.

In this case plaintiff, an Ohio corporation, made a contract in writing in Colorado with defendants, who were citizens of the latter state. It agreed thereby to sell to defendants and deliver f. o. b. cars in Ohio a steam en-

gine for a stipulated price. A Colorado statute required foreign corporations to file a certificate designating their chief place of business, authorized agents, etc., with which requirement plaintiff had not complied. The court, in rendering judgment for plaintiff, held that a single transaction did not constitute "doing business," within the meaning of the state law, and said:

> "We base the conclusion that the demurrer to the defendant's answer should have been sustained upon the interpretation we have given to the Constitution and Statute, and do not find it necessary to decide whether their provisions invade the exclusive right of Congress to regulate commerce among the several states."

Mr. Justice MATHEWS and Mr. Justice BLATCHFORD, in concurring upon different grounds, said:

> "Whatever power may be conceded to a state to prescribe conditions on which foreign corporations may transact business within its limits, it cannot be admitted to extend so far as to prohibit or regulate commerce among the states; for that would be to invade the jurisdiction which, by the terms of the Constitution of the United States, is conferred exclusively upon Congress.
>
> "In the present case, the construction claimed for the Constitution of Colorado, and the Statute of that State, passed in execution of it, cannot be extended to prevent the plaintiff in error, a corporation of another state, from transacting any business in Colorado, which, of itself, is commerce. The transaction in question was clearly of that character. It was the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado. That was commerce; and, to prohibit it, except upon conditions, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress. It is quite competent, no doubt, for Colo-

rado to prohibit a foreign corporation from acquiring a domicile in that state, and to prohibit it from carrying on within that state its business of manufacturing machinery. But it cannot prohibit it from selling, in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce between the states."

Should the Honorable court take the view here suggested, that these transactions constituted inter-state commerce, then the Illinois Statute would have no bearing, and would be eliminated from the case. It would follow, also, that the Federal Statute and the common law defenses would be wholly irrelevant, since no enforcement of the contracts between defendant in error and the Akron companies is involved. The alleged illegality of these contracts cannot serve to render void contracts which are in themselves valid.

## VII.

THE STATUTE OF THE STATE OF ILLINOIS, ENTITLED "AN ACT TO DEFINE TRUSTS AND CONSPIRACIES AGAINST TRADE" APPROVED JUNE 20, 1893, DOES NOT IMPAIR THE VALIDITY OF THE CONTRACT BETWEEN THE PARTIES. THIS STATUTE IS VOID AS BEING IN CONTRAVENTION OF ARTICLE 2, SECTION 2, OF THE CONSTITUTION OF THE STATE OF ILLINOIS OF 1870; also of Section 22 Article 4.

Under the 6th error assigned by plaintiffs in error, this statute is printed in full. (Trans., 248, 49, 50.)

It is alleged that the court erred in ruling "that the Act of July 1, 1893, of the Legislature of the State of Illinois, amendatory and supplemental to the said Act of the General Assembly, entitled, "An Act to provide for the punishment of persons, firms or corporations forming

pools, trusts and combinations and modes of procedure and rules of evidence in such cases," approved June 11, A. D. 1891, and in force July 1, 1891, was unconstitutional and void.

This is the first reference in this record to the statute of 1891. It was not plead as a defense, nor was the court asked to pass upon the validity of this statute. There is nothing in the title or any section of clause of the Act of 1893, to indicate that it was an amendment of the prior statute of 1891. What appears to be a copy of the Act of 1891, was also copied in, presumably with the intention of making it a part of the sixth error. (Trans., 250, 1, 2 and 3.)

The learned counsel were unfortunate in their copy of this statute, evidently taken from one of the older compilations of statutes. If the Act of 1893, is an amendment of the Act of 1891, there is still another amendment, enacted by the legislature in 1897, in the words and figures following, to wit:

> "An Act to amend section one of an act entitled, 'An Act to provide for the punishment of persons, partnerships or corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases,' approved June 11, 1891, in force July 1, 1891.'
>
> "SECTION 1. BE IT ENACTED BY THE PEOPLE OF THE STATE OF ILLINOIS, REPRESENTED IN THE GENERAL ASSEMBLY: That section one of an act entitled 'An Act to provide for the punishment of persons, partnerships or corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases,' approved June 11, 1891, in force July 1, 1891, be amended to read as follows: If any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this

state, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of, or party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, such corporation, partnership or individual or other association of persons shall be deemed and adjudicated guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act: *Provided, however, that in the mining, manufacture or production of articles of merchandise, the cost of which is mainly made up of wages, it shall not be unlawful for persons, firms or corporations doing business in this state to enter into joint arrangements of any sort, the principal object or effect of which is to maintain or increase wages.* Approved June 10, 1897."

Hurd's Revised Statutes of Illinois (p. 615).

A singular feature of the Act of 1893 is that, while it defines trusts, combinations and conspiracies, it prohibits and forbids nothing. While the validity of certain sections of the anti-trust statute of the State of Illinois of 1891, has been involved in several adjudicated cases, our Supreme Court has not in any case referred to the statute of 1893, or given it any judicial construction. The validity of all these statutes or certain sections thereof, was involved in a case submitted to three of our local judges sitting *en banc*, who concurred in the opinion delivered by Judge Tuley, and while we do not claim that this opinion is a controlling authority in courts of

superior jurisdiction, yet it must be admitted that the legal learning and long experience of the learned judge, entitles his opinion to very great respect.

Speaking of the Statute of 1893, Judge TULEY said:

> "It will be observed as a singular fact that while the Act of 1893 defines trusts and conspiracies, etc., it does not in express terms prohibit the entering into or forming of such trusts or conspiracies. Sections 2, 3, 4 and 5 of this Act prescribe certain penalties for violations of the Act. As nothing is either commanded or prohibited therein, there can be no violation thereof. Except as an Act defining a trust, it is a unique specimen of legislative abortion."

Yet it is upon this act and its alleged violation, that the defendants planted their substantial defense.

Judge Tuley also held that Section 1 of the Act of 1891, as amended, is unconstitutional for the reason, "that it is unequal and partial legislation, which is forbidden at common law, and cannot be sustained upon any principle of right and justice."

If state statutes are the legislative declarations of public policy, it would seem to follow that under these statutes, combinations for the purpose of effecting monopolies, are not contrary to the public policy of the State of Illinois. The original Act of 1891, declared that if any corporations, organized under the laws of this state, or any other state, copartnership or individuals, shall enter into or become a party to any pool, combination, etc., with any other corporation, partnership or individual, to regulate or fix the price of any article of merchandise, etc., they shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment. (Trans. p. 250.)

Section 9 of the Act of 1893 provides that: "The provisions of this Act shall not apply to argicultural products or live stock while in the hands of producer or raiser."

The Act of 1891, as amended in 1897, permits all persons, firms or corporations engaged in mining or the production and manufacture of merchandise to enter into joint arrangements of any kind for the purpose of maintaining or increasing wages. These statutes have not the essential principle of equality, and similar statutes have been uniformly condemned by our Supreme Court, as being prohibited by the Constitution, and forbidden at common law.

*Judge Cooley on Constitutional Limitations,* says that:

> "Equalities of rights, privileges and capacities, unquestionably should be the aim of the law."
>
> "Distinctions in these respects must rest upon some reason upon which they can be defended,—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness;' and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived."

Cooley's Const. Lim., 6th Ed. p. 484.

*Millett* v. *The People*, 117 Ill., 294, was a criminal proceeding against Millet, under "An Act to provide for the weighing of coal at the mines, requiring all of the coal produced in the state to be weighed on the scales as provided in Section 1 of the Act, and to keep a record, etc."

The question presented, was whether it was competent for the General Assembly to single out owners and operators of coal mines as a distinct class and provide that they bear burdens not imposed upon other owners of property or employers of laborers, and prohibit them from making contracts which it was competent for other owners of property to make.

The court held that this act was in violation of Section 2, Article 2 of our Constitution, which provides that "No person shall be deprived of life, liberty or property, without due process of law," and further held that "due process of law" in this connection are held to be synonymous with the words "the law of the land," and this means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals."

> "Every one," says Cooley (Const. Lim., 2nd Ed., 391), "has a right to demand that he be governed by general rules, and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but an arbitrary mandate unrecognized in free governments." (p. 301.)

Also in *Frorer* v. *The People*, 141 Ill., 171, the court held that:

> "It is not competent for the legislature to select operators of mines, or manufacturers, and provide

> that they shall bear burdens not imposed on owners of other property, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make."

To the same effect *Brraceville Coal Co.* v. *People,* 147 Ill., 75; *Ritchie* v. *People,* 155 Ill., 105; *Harding* v. *People,* 160 Ill., 465.

These authorities are conclusive that these trust and conspiracy acts cannot be sustained, because they violate Section 2, Article 2 of the Constitution of the State of Illinois of 1870. It will be observed that there are no exemptions in favor of special classes or combinations under the statute of 1891. It is a part of the history of this legislation that at the time this law took effect, there were many combinations of agriculturists organized for the purpose of maintaining the prices of their products, and for the promotion of their private interests. By these combinations, the Act of 1891 was condemned as destructive of their best interests, and therefore, at the next session of the Legislature in 1893, the Act was amended, exempting from its provisions and burdens all "agricultural products or live stock, while in the hands of producer or raiser."

The farmers can now, like Prince Hatto in the Legend, hold "barns full of grain, the gift of God for the food of man—can refuse to sell it to a starving folk, preferring to hold on for higher prices," without fear of criminal prosecution under either statute.

Under this statute the producers of agricultural products could form corporations or other combinations for maintaining or enhancing the market value of the prime necessaries of life, while the manufacturers of agricultural

machinery and other articles, were denied the same privileges. Thus a combination of a very large per cent. of the people of the State of Illinois for the purpose of carrying out restrictions in trade, or to limit or reduce the production, or increase or reduce the price of merchandise or commodities, was not prohibited, while under the same law, a combination of manufacturers for the same purpose is declared to be a conspiracy against trade to be punished by a fine of not less than $2,000, nor more than $5,000. Apparently, the agriculturalists were content with the law of 1893, but it appears that laborers engaged in mining or manufacturing interests, believed that the statute was a restriction of their rights, and did not afford them equal protection, hence, the amendment to the statute of 1891, providing that in the mining, manufacture or production of articles of merchandise, the cost of which is mainly made up of wages, "it shall not be unlawful for persons, firms or corporations, doing business in this State, to enter into joint arrangements of any sort, the principal object or effect of which is to maintain or increase wages."

Here is a distinct unlawful discrimination between manufacturers—it is class legislation of the most vicious kind. It permits, or at least, it does not prohibit a combination of all the manufacturers within the state, providing that the cost of the articles manufactured "is mainly made up of wages," and the principal object of the combination is to maintain or increase wages, but if another class of manufacturers, whose products are not mainly made up of wages, enter into a combination, the purpose of which is to cheapen the cost and maintain the price of their products, this class of manufacturers will be guilty under this statute, of a conspiracy against trade, punishable with a fine of from $2,000 to $5,000.

In *Braceville Coal Co.* v. *People, supra,* it was urged in defense of the statute that it was simply a restriction affecting the corporation only, and it was insisted that this authority was reserved under Section 9 of the General Incorporation Act of the State.

Relative to this contention, the court said:

> "It is expressly held that the reservation of the right to alter, amend or repeal the charter entered into and formed a part of the contract between the State and the corporation chartered under the constitution of 1848, and that the power reserved might be constitutionally exercised (*Butler* v. *Walker,* 80 Ill., 345), and undoubtedly the same construction should be placed upon the reservation of power in the section quoted. But by Section 1 of Article II of the Constitution, it is provided: "No corporation shall be created by special laws, or its charter extended, changed or amended, * * * but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created.' The manifest intention of this provision of the constitution was to require not only the creation of corporations, but amendments to charters of those existing, to be made by general laws, applicable alike to all occupying like circumstances and existing under the same conditions; and it necessarily follows that special acts, applying to particular corporations only, and not to the general body of corporations created under the act, would fall within the prohibition of this section."

Can it be held under these authorities that the conspiracy statutes under consideration are not repugnant to, and prohibited by the Constitution of the State of Illinois?

## VIII.

THE STATUTE OF THE STATE OF ILLINOIS OF 1893, AS WELL AS THE STATUTE OF 1891, AS AMENDED IN 1897, IS REPUGNANT TO THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

We have already pointed out wherein these statutes do not preserve "the essential principles of equality"—that they impose restrictions and burdens upon one class of the community, that are not imposed upon other similar classes. If this be true, these statutes, and all other state legislation similar in character and principle, are condemned by repeated decisions of this court.

The precise question was involved in *Barbier* v. *Connolly*, 113 U. S., 27. The case was brought to this court by writ of error to the Superior Court of San Francisco. In the opinion of the court, by Mr. Justice FIELD, it is said:

> "The Fourteenth Amendment, in declaring that no State shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the

> same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." (p. 31.)

These precise words are quoted and approved in *Yick Wo* v. *Hopkins,* 118 U. S., 367:

In support of this proposition, it is unnecessary to cite other cases. This court has steadily held that the "subject of equality before the law, is a fundamental principle of English and American liberty, which not only has been held sacred in all latter-day constitutions, state and federal, but the principle has been guarded by the courts with jealous watchfulness to see that the citizen may have guaranteed to him this inestimable privilege and condition."

## IX.

UNDER ALL THE EVIDENCE AND PROCEEDINGS IN THESE CASES, THE COURT DID NOT ERR IN DIRECTING THE JURY TO RETURN A VERDICT FOR THE PLAINTIFF.

(a) It is shown by the evidence that but six manufacturers of sewer pipe became interested in the organization of the Union Sewer Pipe Company, and entered into contracts for the sale of their product, out of the seventy-five to one hundred corporations and copartnerships engaged in the same business in the several states.

(b) That the product of the six constituent manufacturers was not reduced in quantity, nor was the market price increased.

(c) That the defendant in error did not, and could not, control the market price of the product either in Chicago or elsewhere—there were several other manufacturers in competition with the defendant in error in all the markets.

(d) The contracts between the defendant in error and the manufacturers within the "Akron District," did not operate either in restraint or partial restraint of trade, nor did they amount to a conspiracy between the parties to control prices by creating a monopoly.

If it should be held that the validity of the organization of the Union Sewer Pipe Company, or its contracts with the manufacturers at Akron, are involved in this controversy, then our contention is that such contracts were not invalid, or contrary to public policy.

*Oregon Steam Navigation Co.* v. *Windsor*, 20 Wallace, 66, was an action brought to recover stipulated damages for the breach of a certain agreement between the parties. In defense it was claimed that the contract was void as being in restraint of trade and against public policy.

Mr. Justice BRADLEY, speaking for the court, laid down the following rule, to wit:

> "It is a well settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made."

And in *Gibbs* v. *Consolidated Gas Co.*, 130 U. S., 396, it is said:

> "Where the public welfare is not involved, and the restraint upon one party is not greater than protection to the other party requires, a contract in restraint of trade may be sustained."

*Dolph* v. *Troy Laundry & Machinery Co.*, 28 Fed. Rep., 554.

In this case it appears that parties who were competitors in the business of manufacturing and selling washing machines throughout the United States, and who were the principal but not the only manufacturers in this country, entered into a contract for the purpose of avoiding the consequences of competition with each other and to secure better prices and better profits. The action was brought to recover damages for breach of the contract, the real question being whether such contract was reasonable or unreasonable.

Relative to this defense, Mr. Justice WALLACE said:

> "Assuming that, in entering into the contract, the parties contemplated that the defendant should cease manufacturing machines, and buy all its machines from the plaintiff, and that the only purpose in view was to promote the interests of the parties, and enable them to obtain from customers higher prices for the machines, it is not obvious how such a contract contravenes any principle of public policy. Washing machines, although articles of convenience, are not articles of necessity. The scheme of the parties did not contemplate suppressing the manufacture or sale of machines by others. Those who might be unwilling to pay the prices asked by the parties could find plenty of mechanics to make such machines, and the law of demand and supply would effectually counteract any serious mischief likely to arise from the attempt of the parties to get exor-

bitant prices for their machines. It is quite legitimade for any trader to obtain the highest price he can for any commodity in which he deals. It is equally legitimate for two rival manufacturers or traders to agree upon a scale of selling prices for their goods, and a division of their profits. It is not obnoxious to good morals, or to the rights of the public, that two rival traders agree to consolidate their concerns, and that one shall discontinue business, and become a partner with the other for a specified term. It may happen, as the result of such an arrangement, that the public may have to pay more for the commodities in which the parties deal; but the public are not obliged to buy of them. Certainly, the public have no right to complain, so long as the transaction falls short of a conspiracy between the parties to control prices by creating a monopoly. It is hardly necessary to cite authority in support of these propositions, but, if any is needed, enough will be found in the opinions in the cases of *Jones* v. *Lees*, 1 Hurl. & N., 189; *Ainsworth* v. *Bentley*, 14 Wkly. Rep., 630; *Marsh* v. *Russell*, 66 N. Y., 292; and *Perkins* v. *Lyman*, 9 Mass., 522."

*Central Shade Roller Co.* v. *Cushman*, 143 Mass., 353.

"In that case three manufacturers of patented curtain fixtures, desiring to avoid competition, formed a corporation of which they were the only stockholders. An agreement was executed between this corporation and the three manufacturers, by which the manufacturers gave the corporation the sole right to sell the curtain fixtures for three years, the corporation agreeing to buy at a fixed price all that the manufacturers might make. The manufacturers were to act as selling agents of the corporation and receive a commission. The agreement further provided against any of the manufacturers disposing of their patents or stock in the corporation. This agreement was valid, and one of the manufacturers enjoined from selling on his own account."

The Supreme Court of the State of Illinois adheres to the same rule.

In *Craft* v. *McConoughy*, 79 Ill., 349, the court said:

> "We understand it to be a well settled rule of law that an agreement in general restraint of trade is contrary to public policy, illegal and void, but an agreement in partial or particular restraint upon trade has been held good, where the restraint was only partial, consideration adequate, and the restriction reasonable."

The same rule in *Lynn* v. *Sibsbee*, 67 Ill., 75.

*Brown* v. *Rounsavell*, 78 Ill., 589.

This was an action of debt on a penal bond brought by Rounsavell, the defendant in error, against the plaintiff in error, and the obligors in the bond. Hanson and Wolff entered into a contract with Rounsavell by which the latter granted them the right to purchase from him the Etna sewing machine and accessories for sale within the County of Cook. In consideration of the agreement Hanson and Wolff agreed to deal exclusively in Etna sewing machines and accessories sold by Rounsavell, and to purchase their supplies of machines from him; Rounsavell agreed to furnish the machines and accessories at a discount from the Chicago retail prices of thirty per cent. on six months' time. Under this agreement Rounsavell sold and delivered Hanson and Wolff a large number of sewing machines, but they refused to pay for the same as provided in the contract. One of the defenses interposed was that by reason of the restrictions in the contract requiring Hanson and Wolff to deal exclusively in the Etna machines, said contract was in restraint of trade, and therefore, void.

The court said:

> "We see nothing in such a contract so in restraint of trade as to make it in that respect against public policy, and require that it should be adjudged void. We know of no warrant of authority therefor."

The purpose and intention of the promoters and stockholders of the Union Sewer Pipe Company are clearly disclosed by the evidence. The leading officers of the constituent companies were called as witnesses by the plaintiffs in error, and in their evidence there was no concealment of their purpose. The contract was to extend for a period of five years, and provided for the sale of their products. The capacity of the manufactories was not reduced, nor were prices advanced. Their market for the sewer pipe was not confined to any locality or territory, but covered both eastern and western states. Not to exceed twenty per cent. of their product was sold in the Chicago market, and the claim that they had a monopoly of the Chicago market is but a mere pretense, and is contrary to the evidence. The contracts between the defendant in error and the manufacturers were executed in January, 1893, and the evidence is that the market price was not advanced in any market after that date, but, on the contrary, there was a steady and constant decrease of market value. Plaintiffs in error claimed upon the trial that prior to January, 1893, they had contracts with Camp and Thompson for about two hundred and three hundred car loads of pipe, respectively, at seventy-five per cent. of the Western Price List, and that after the organization of the Union Sewer Pipe Company they were compelled to pay that company eighty per cent. of the price list. They claimed that they had been informed by Camp and Thompson that the Union Sewer

Pipe Company had assumed these contracts, but the evidence of their witness, Hill, is that Camp and Thompson denied the contract. If plaintiffs in error had such contracts, Camp and Thompson would have been liable to them for damages resulting from the breach, and their claim should be made against that firm, instead of the defendant in error.

Referring to their contract with the defendant in error (Trans., 176), it appears that they were charged seventy-five per cent. of the price list for only the larger pipe with rings, while the balance of the pipe was sold to them at from eighty to ninety per cent. of the Western Price List. Under the evidence, plaintiffs in error were not damaged by reason of the contract, but, on the contrary, were greatly benefited.

We submit that under the circumstances of the case and the nature of the particular contracts involved in it, the contracts were not unreasonable or invalid as in restraint of trade, nor were they contrary to public policy.

---

Plaintiffs in error assign in the court below fourteen errors, covering twenty-four pages of the transcript. In the first six they have incorporated what they consider the essential evidence, supplemented by suggestions of argument. We do not understand this to be in accordance with the rules of this court. Plaintiffs in error are required to file a statement of errors, and the evidence is preserved by bill of exceptions; such parts of the evidence as they deem important are printed in the transcript, and thus brought to the court for its consideration.

The fourth error is as follows:

> "The court erred in excluding the deposition of Frank S. Monett, attorney general of the State of Ohio, for the reasons that the said depositions on their face showed that they were taken and certified under the law of the land and the practice of said court, and the said depositions contained testimony relevant to the issues in this case."

Then follows a statement of the learned counsel of the contents of the deposition, or rather, the facts proven by the evidence. These depositions are not printed in the transcript and, therefore, we assume, cannot be considered by the court.

The sixth error (printed seven) charges that the court erred in its charges to the jury. Then follows a copy of the so-called charge. This was the opinion of the court upon plaintiff's motion to direct a verdict; and, after sustaining the motion, the jury was so directed for the reason stated in the opinion and for the additional cause that, under all the evidence and proceedings, the defendants had failed to make good their defense. In this ruling of the Circuit Court, we respectfully submit, there was no error.

HERBERT HAMLIN,
*Attorney for Defendant in Error.*

EDWIN WALKER,
*Of Counsel.*

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 46

THOMAS CONNOLLY,
*Plaintiff in Error,*
*vs.*
UNION SEWER PIPE COMPANY,
*Defendant in Error.*

WILLIAM E. DEE,
*Plaintiff in Error,*
*vs.*
UNION SEWER PIPE COMPANY,
*Defendant in Error.*

In Error to the Circuit Court of the United States for the Northern District of Illinois.

## ABSTRACT OF EVIDENCE.

HERBERT HAMLIN,
Attorney for Defendant in Error.

EDWIN WALKER,
of Counsel.

BARNARD & MILLER PRINT.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 259.

THOMAS CONNOLLY,
*Plaintiff in Error,*
*vs.*
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*Defendant in Error.*

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*Plaintiff in Error,*
*vs.*
UNION SEWER PIPE COMPANY,
*Defendant in Error.*

In Error to the Circuit Court of the United States for the Northern District of Illinois.

## ABSTRACT OF EVIDENCE.

TRANS. PAGE.

Evidence of DAVID E. HILL, a witness for the defendant:

62 Q. What is meant by standard Akron pipe in the trade?

A. We manufacture different thicknesses, and standard refers to the thickness of the pipe—standard thickness. Some of the firms in Akron have adopted the name of Standard Akron Sewer Pipe with an idea that they had a better grade of pipe than some others.

The Pennsylvania Sewer Pipe Company and the Crown Fire Clay Company made standard pipe, but never pretended to make standard Akron pipe.

63 There were seventy-five or eighty other companies in the country made standard pipe. The term standard pipe really refers to the thickness of the pipe. They all claim that they make good pipe, and they do make it. I made the subscription to the capital stock of the Union Sewer Pipe Company. I thought it was to the interest of the manufacturers and dealers to subscribe. The manufacturers did not get better prices, but their expenses were far less when combined than when separated. When separate, they sent out as many as fourteen travelling men, and when combined not half that many. It saved book-keeping and office expenses.

64 I never told Dee or Connolly that the manufacturers here (Akron) had formed a pool to control the output of sewer pipe and to limit the sales. I know there was nothing of that kind said to them.

65 During all the time there were other companies competing with us in the market in the State of Illinois. There were three companies in St. Louis, two companies in Red Wing, Minnesota, two companies in Michigan and a number of Ohio river companies. I could name other companies, if I had more time, that compared favorably with the Akron Company. One of them was the second largest company in the United States.

66 I think there were forty other companies that competed with us for the trade in Illinois. All these companies were entirely independent of the Union Sewer Pipe Company. They had no agreement with us, and they regulated their own prices.

67 The principal dealers in Chicago were Williams, Dee and Connolly. Dee and Connolly are the defendants in this case.

68 Under the contract with Dee & Connolly, the pipe was all delivered in Akron. We made no deliveries to them within the State of Illinois. We delivered nothing in Chicago, except to our agencies. Williams was our agent, and his agency terminated about the first of January, 1895.

69 Since July 1, 1896, Mr. Connolly has told me that he would be glad to see a continuation of the business of the Union Sewer Pipe Company. He said the organization of the Union Sewer Pipe Company had a beneficial effect upon his business and its discontinuance was disastrous.

71 During the period from January 1, 1893, to July 1, 1896, Dee and Connolly told me that there was an agreement between the dealers in the city of Chicago as to the prices to be put upon the pipe sold by them.

74 The card of prices had no influence whatsoever upon the price of the pipe. It was a card made years ago by an agreement among the manufacturers, and they have all kept the same card and worked and discounted from the same card. It was not gotten up here in Akron.

Evidence of HORACE B. CAMP, witness called by defendant:

76 Prior to 1893 there was a manufactory of sewer pipe at Cuyahoga Falls, in the Akron District. The pipe manufactured in this district was sold all over the country—in the eastern and western states. In some localities parties would purchase nothing but river pipe, and in others they preferred the Akron pipe. In Chicago, as a general thing, they preferred the Akron pipe.

77 It is not a fact that in 1893 engineers in charge of village and city sewer works near Chicago specified Akron pipe for sewers. Up to the formation of the

union I was by myself, and they objected because we advertised as having Akron pipe. Our factory was five miles from Akron, and our pipe was made of different clay.

78 Our company entered into a contract with the Union Sewer Pipe Company for the handling of all our output of sewer pipe. They were to take all our pipe and pay for it. The price list was used as a basis, and the Union Sewer Pipe Company paid a certain percentage of that list. The profits were pro-rated among all the companies that had contracts with the Union Company.

79 I am familiar with the western card. That settled the gross price of pipe in the western market, but no more so in Chicago and Illinois than in Ohio, Indiana and Michigan.

80 When we made our estimate for the prices that the Union Company should pay, the manufacturers took all the trade in the country as a whole.

81 I had a manufactory of sewer pipe outside of the Union Sewer Pipe Company during all the years from 1893 to the present time. I was a competitor from April, 1893, with the Union Sewer Pipe Company, and my pipe was sold at Chicago as Akron sewer pipe. The Crown Fire Clay Company was treated as being in the Akron district when it was thirty or forty miles away. The principal owner lived in Akron.

84 During the time I was connected with the union, the price of pipe was governed by the trade. Mr. Hill was president of the company, but did not decide at what prices the pipe should be sold. The state of the market decided the prices. The Union Sewer Pipe Company was organized in February, 1893. In 1892 and '3 quite a large per cent.

of the ring pipe was manufactured for the Chicago market, but later on they got to doing it in the eastern states.

87 During that time, I should judge that twenty-five to thirty per cent. of this kind of pipe was sold to the Chicago dealers. Mr. Connolly, Dee and Williams were the principal dealers. The chief consumption of the Akron pipe was in the New England states. Previous to the formation of the Union Company, Mr. Dee and his father had been customers of ours for quite a number of years. We were, perhaps, furnishing them more pipe than any one else up to 1892. After that the National Sewer Pipe Company furnished them the most. After the formation of the Union Sewer Pipe Company, the H. B. Camp Company, of Greentown, furnished them pipe directly, without the intervention of the Union Sewer Pipe Company.

91 We frequently came to the relief of Mr. Dee during the years 1894 and 1895. What is known as city pipe was made at my private factory at Greentown, and by the Central Company and by a good many other companies. If a Chicago dealer was unable to obtain sewer pipe from the Union Sewer Pipe Company, I know of no reason why he could not have obtained it from other companies, except that the Chicago dealers had less trouble in getting Akron pipe accepted than other pipe. I think many of the specifications for sewer pipe in Chicago called for Akron pipe or pipe of equal quality. During this time Dee and Connolly could have obtained city pipe for Chicago from Red Wing, from Columbus, Ohio, and from the Central Company, and also from H. B. Camp & Company. The sales of the Central Company were fifty per cent. greater than the sales of the Union Sewer

pipe Company. I think the pipe of the Central Company was the best pipe.

94 The Central Company was an organization formed for the purpose of dealing in pipe and buying and selling the pipe manufactured on the Ohio river. It had contracts with manufacturers similar to the contracts of the Union Sewer Pipe Company.

95 The contracts between the Union Sewer Pipe Company and manufacturers and between the Central Company and manufacturers did not substantially cover the field of sewer pipe manufactories in the State of Ohio. I know of three that were not included, and, I think, a good many more.

96 Other manufactories in the north-west manufactured what is known as city pipe. I was shown some of this pipe by Mr. Dee, and he told me that it was made in the north-west. He told me that he bought it at Red Wing.

97 Between January, 1893, and July, 1896, there were numerous companies competing with me for the Illinois market. These other companies included the Columbus Sewer Pipe Company; two at New Brighton, Pennsylvania; two at Red Wing. There was also more or less pipe from St. Louis, White Hall and the Brazil Company, and Thomas Connolly was making pipe at that time. It is a fact that during that time the defendant, Connolly, was one of my competitors as a pipe manufacturer.

98 The Union Sewer Pipe Company, after its organization, did not control the price of pipe. It did not control the prices of my pipe after the 1st of April, 1893. One of the objects of the organization of the Union Sewer Pipe Company was to economize expenses of operation.

100 It requires less traveling men. "There are other advant-

ages; for instance: if we got an order that some parts of it were lacking at the shop, we could load it in part and ship to any of the other factories to fill it and go on. We could not do that until the organization of the company."

"There are more than 500 different shapes of sewer pipes made. My experience—in running through the winter months, I supposed I had a stock of everything on hand which was likely first to be ordered in the spring, but just as likely they would call for something we have not got, but working together in this way some of us would have it. If we had been on our own hook we either had to lose the order or induce the people to wait. The feeling of the people was such that they would not accommodate one another at all before the union was formed, and this was certainly a benefit to the dealers." Prices in the Chicago market have been growing lower ever since the formation of the union. The price of pipe sold by the Union Company was lower as they had to continually meet competition.

102 The Union Sewer Pipe Company had 50 or 60 competitors in the United States. There are about 100 manufactories, but a good many of them are not competitors. There were 15 or 20 competitors in the State of Illinois. I have no interest in the result of these suits.

Evidence of JOSEPH A. BALDWIN, a witness for the defendant:

103 I have been in the manufacture of sewer pipe for more than twenty years. From January, 1893 to July, 1896, there were competitors of the Union Sewer Pipe Company in the Illinois and Chicago markets. There were some in Ohio.

There were two companies in the vicinity of Columbus, Ohio, and two or three at St. Louis; one at Utica; two or three on the river and one north of Chicago. I don't know just how many were competitors. There was no understanding or agreement to my knowledge between the Union Sewer Pipe Company and these competing companies as to prices.

109 During the years 1893 and 1896 I suppose there were 75 or 100 manufacturing establishments in the country, but I do not know how many of them reached the Chicago market, but there were several in Illinois, Missouri and Michigan, and perhaps some in Indiana.

Evidence of HARRY THOMPSON, a witness for the defendant:

109 I am generally familiar with the details of the sewer pipe business both in manufacturing and selling. During the existence of the Union Sewer Pipe Company the Red Wing of Minnesota, Brazil Sewer Pipe Company, two or three in St. Louis and several others were competitors of the Union Sewer Pipe Company in the Chicago market. These companies had no arrangements with the Union Sewer Pipe Company regulating prices in the Chicago or other markets. With all these other competing companies the Union Sewer Pipe Company could not control the prices.

118 The Union Sewer Pipe Company, after its organization did not advance the price of pipe in the Chicago market. I think it gradually went lower all the time.

Evidence of Ed. M. Buel, a witness for the defendant:

120 This witness testified that the Union Sewer Pipe Company had competitors in the Chicago market from 1893 to 1896, naming the same competitors as the preceding witnesses.

126 During the last five or six years other companies competed with the Union Company in the Chicago market for the sale of sewer pipe, and I think their ability to do so has been increasing during the last five or six years.

127 During the last three or four years the makers of other pipes have been able without difficulty to get into the Chicago market.

*Cross-Examination of*

138 Defendant's witness, Henry J. McNichols:

I was Chief Inspector of sewer pipe of the City of Chicago during the years 1893-5 and 6. By standard Akron pipe I mean that the pipe must be smooth, hard burned, well vitrified and it must be of standard thickness.

139 The specifications called for standard pipe and standard pipe had a definite meaning.

*Cross-Examination of*

Defendant, William E. Dee:

158 Q. Now, from 1893 down to 1896 you were still, you say engaged in the same business. What brands of pipe did you handle during those years? A. Camp & Thompson and National Sewer Pipe. A few cars we had, I think, from the Akron Sewer Pipe Company. Probably some from the Crown. I handled a few cars of Columbus pipe, and I handled pipe manufactured at Brazil, Indiana.

159 I handled pipe from other manufactories, from places outside the city of Chicago, but not in the city.

160 I am certain that for main sewers constructed in Chicago specifications called for Akron Standard pipe. I think it was previous to 1890. In 1893 I am sure it was "Akron or its equal." "Akron or its equal" were in the specifications.

166 I have referred to a conversation had with Mr. Hill relative to my contract with Camp and Thompson. Mr. Hill said that he would see Mr. Camp about it. At a later interview he told me he had seen Mr. Camp and that Camp denied the contract and this he gave as a reason for not assuming the contract.

Mr. WILLIAM D. KENT, defendant's witness, testified:

168 That he was appointed Commissioner of Public Works in the City of Chicago in the year 1895 and continued in office until the 20th day of July or August, 1896. The department of sewers is a sub-branch of the department of public works.

169 I know something about Standard Akron pipe. It was used in the building of new sewers in the City of Chicago. Specifications were issued showing that nothing but Akon pipe was to be used. This was practically so when I became Commissioner of Public Works. From the experience I gained as a member of the council I was of the opinion that there was a combine among the sewer builders and the manufacturers of sewer pipe, so that I gave directions for a list of the different kinds of sewer pipes and the names of the manufacturers, so that we could make tests of the different kinds manufactured. I sent samples to the Illinois University at Champaign, and instructed the professors there to have tests made. Each sample bore a different number, and they reported the results of the tests to us by number. I instructed them that

we wanted to have no pipe that was not absolutely perfect and they returned as the result of their tests seven or eight pipes of different manufacture reported favorably upon as being absolutely perfect and safe and the balance they rejected. I then instructed the sewer department not to allow in any of the pipe that had been rejected, but that any that had passed the tests that I had ordered made could be accepted by the contractors and that any one in the sewer business could use them in the city's work under their contracts. This was during the summer of 1895.

P. M. FINSTHWAIT, defendant's witness, testified:

171 I am at present Sewer Inspector for the City of Chicago, and have been since 1887, except from July, 1895, to 1897. My duties are and were to inspect pipe for the main sewers.

172 No pipe has been placed in the sewers during my term that has not passed my examination and inspection. "Standard Akron pipe" means round, straight, proper thickness, vitrified and glazed. It does not mean pipe manufactured in any particular locality, and the phrase "Standard Akron pipe" was never in the specifications since I was a sewer inspector.

Evidence of THOMAS CONNOLLY, defendant:

185 The standard Akron pipe is no better than any other pipe. Not a bit. I have been in the pipe business, manufacturing pipe from 1868 and know something about what pipe is. I say there is a good pipe in the market and always has been. It was always a matter of test. There has always been as good pipe in other markets, and I have sold it myself in Buffalo, Pittsburg and other markets. Prior

to 1893 I sold lots of other pipe in the market at Chicago.

186 Akron pipe has been rejected because the word Akron was not stamped upon it. The inspection depended a good deal upon how we treated the inspectors.

Q. So if the dealers in the Akron pipe treated them kindly the Akron pipe would pass inspection? A. The Akron folks had not to treat them; it was the dealers here that had to treat them. We had to do this, and could not get along very well without it.

BYRON W. ROBINSON, witness called on behalf of the plaintiff:

194 Other manufacturers deny that the Akron pipe has any special virtue. There are other factories manufacturing substantially the same quality of pipe at various points in Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York. The factories that make what is known as shale pipe that I am acquainted with, are as follows:

The Chicago Sewer Pipe Company, Brazil, Indiana; The Streator Manufacturing Company, Streator, Illinois; Monmouth Mining and Manufacturing Company at Monmouth, Ills.; Bennett Sewer Pipe Co., at Jackson, Michigan; The Macomb Sewer Pipe Company, at Macomb, Illinois; the Columbus Sewer Pipe Company, at Columbus, Ohio; The Sharon Clay Manufacturing Company, of Sharon, Pennsylvania; The Standard Sewer Pipe Company, of Rochester, N. Y.; Otis & Gores, of Rochester. There may be others, but I don't recollect them now.

195 All these factories have a substantial capacity. The Columbus factory has a capacity of about a thousand carloads per annum. All these factories manufacture this sewer pipe from shale, and place it upon the market in

this vicinity and in the Ohio market. From 1890 down to 1896 four or five of the factories I have named marketed pipe in Chicago, more or less. The pipe was in the market and for sale.

196 I do not think there was any substantial difference in the quality of the goods manufactured by these different companies or in the value of the goods manufactured. The Camp and Thompson pipe was perhaps a little inferior, and always sold for a little lower price than the market value of the Akron pipe.

197 All of the companies that entered into contract with the Union Sewer Pipe Company continued to prosecute the work of manufacturing sewer pipe after the contract was made. Since the date of that contract there has been a large increase in the output of these factories. There was not any time a decrease, nor did any of the factories close.

During the year 1893 the price was seventy-five off city inspected ring pipe, but the price was gradually reduced until in 1896 we were selling at eighty-two off. There was a gradual reduction in the price of pipe from 1893 to 1896.

198 There was sharp competition between the companies that I have named and the Union Sewer Pipe Company in the market at Chicago, prior to and since 1893. Some of these companies had a lower rate of freight than we had. In the market at Chicago we had to compete with these companies and sell at the same rates or price. There was no change in the general conditions after the organization of the Union Sewer Pipe Company. The Union Sewer Pipe Company, after 1893, had to meet the same conditions in competition as the constituent companies prior to that time.

200 After the organization of the Union Sewer Pipe Company, the supply of sewer pipe was not diminished.

201 After the fall of 1896, after the Union Sewer Pipe Company had gone out of business, I had a conversation with Mr. Dee in his office in Chicago, in which he said he was sorry the Union Company quit doing business. After the organizattion of the Union Sewer Pipe Company, I think about 20 per cent. of the product of the Akron mills was sold in the Chicago market. The rest found other markets in the country.

WILLIAM A. HUMPHREYS, on rebuttal, testified:

213 From the 1st of January, 1893, to the 1st of October, 1899, I was connected with the Columbus Sewer Pipe Company at Columbus, Ohio. That company was engaged in the manufacture of sewer pipe. The Columbus Company's pipe is of the same quality as the Akron Sewer pipe; there is no difference in it to my knowledge. It is the same clay—shale clay.

214 During all the time from 1893 until the present time the Columbus pipe has been used in the City of Chicago by contractors in the construction of sewers. About one-third of the sales in this city was of the Columbus pipe. About 75 car-loads per year were sold for main sewers.

215 There were no more rejections of the Columbus pipe than of the Akron pipe by the sewer inspectors. They never objected to our pipe because it was not standard Akron pipe. When they rejected a piece of our pipe another piece of the same was substituted. They only rejected defective pipe.

HERBERT HAMLIN,
*Attorney for Defendant in Error.*

EDWIN WALKER,
*Of Counsel.*

# Supreme Court of the United States.

No. 46.—October Term, 1901.

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| Thomas Connolly and William E. Dee, Plaintiffs in Error, vs. The Union Sewer Pipe Company. | In error to the Circuit Court of the United States for the Northern District of Illinois. |

[March 10th 1902.]

Mr. Justice Harlan delivered the opinion of the Court.

The Union Sewer Pipe Company—a corporation organized under the laws of Ohio and doing business in Illinois—brought its action against Thomas Connolly, a citizen of Illinois, in the Circuit Court of the United States for the Northern District of Illinois, on two negotiable promissory notes both executed at Chicago by the defendant; one, dated December 15th 1894, the other dated January 15th 1895, and each payable to the order of the plaintiff corporation ninety days after date at the First National Bank of Chicago.

These notes were given on account of the purchase by the defendant from the plaintiff of sewer pipe commonly known as standard Akron pipe, at prices agreed upon between the parties.

The Pipe Company also brought an action in the same court against William E. Dee, a citizen of Illinois, upon an open account for $2,389.26, the value at agreed prices of certain pipe purchased by him from the plaintiff in June 1896. The plaintiff supplied the pipe under a written contract executed between it and the defendant in Illinois under date of August 1895.

Each of the defendants filed a plea of the general issue, with notice of special defenses and of set-off.

The special defenses in each case were substantially the same. The notice in the Connolly case was that the defendant on the trial of the action would rely on these special matters:

"First. That the plaintiff is, and at all times since about the first day of January 1893 has been a trust or combination of the capital, skill and acts of divers persons and corporations carrying on a commercial business in the States of Ohio and Illinois and between said States and elsewhere in the United States of America, and organized for the express purpose of unlawfully and contrary to the common law creating and carrying out restrictions in trade, to wit, in the trade of buying, selling and otherwise

dealing in certain articles of merchandise, to wit, sewer and drainage pipes, and also for the express purpose of unlawfully and contrary to the common law limiting the production of said articles of merchandise and increasing the market price thereof; and also for the express purpose of unlawfully and contrary to the common law preventing competition in the manufacture, making, transportation, sale or purchase of said articles of commerce; also for the express purpose of unlawfully and contrary to the common law fixing standards or figures whereby the prices of said articles of merchandise intended for sale, use and consumption in this State should be controlled and established; and also for the express purpose of unlawfully and contrary to the common law being a pretended agency whereby the sale of said articles of commerce should and might be covered up and made to appear to be for the original vendors thereof, and so as to enable the original vendors or manufacturers thereof to control the wholesale and retail price of such articles of commerce after the title thereto had passed from such vendors or manufacturers; and for the further express purpose of unlawfully and contrary to the common law making and entering into and carrying out a certain contract or certain contracts by which the several persons or corporations forming the plaintiff, or being the pretended stockholders thereof, to wit, have bound themselves not to sell, dispose of or transport said articles of commerce below certain common standard figures or card or list prices in excess of the true market values thereof, and by which they have agreed to keep the prices of said articles of commerce at certain fixed or graduated figures, and by which they have established certain settled prices of said articles of commerce between themselves and others, so as to preclude a free and unrestricted competition among themselves and others in the sale and transportation of said articles of commerce, and by which they have agreed to pool, combine and unite any interests they may have in connection with the sale and transportation of said articles of commerce so that the prices thereof may effect advantageously to themselves; that all of the claims of the plaintiff against the defendant in this action arise wholly out of and are in respect of sales of said articles of merchandise made between the 1st day of January A. D. 1893 and the 1st day of March 1896 to this defendant by the plaintiff in the ordinary course of its business as such a trust or combination acting as aforesaid, and that this action is brought to recover the alleged price thereof and for no other purpose.

"Secondly. That the plaintiff is and at all times since the 1st day of January 1893 was a combination in the form of a trust, in restraint of trade and commerce among the several States, and doing business as such throughout the United States and between the States of Ohio and Illinois, contrary to the provisions of an act of Congress of date of July 2d 1890 and entitled 'An act to protect trade and commerce against unlawful restraints

and monopolies,' and that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes, sold to the defendant by the plaintiff, then and there acting and doing business as such a combination, as aforesaid, in violation of the provisions of said act.

"Thirdly. That the plaintiff is and at all times since the 1st of January 1893 was a trust doing business as such in the State of Illinois and elsewhere, contrary to the provisions of an act of the legislature of the State of Illinois entitled 'An act to define trusts and conspiracies against trade, declaring contracts in violation of this provision void, and making certain acts and violations thereof misdemeanors, and prescribing punishment thereof and matters connected therewith, approved June 20th 1893, in force July 1st 1893;' that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes, sold to the defendant by the plaintiff, then and there acting and doing business in violation of the provisions of said act, and that the defendant hereby pleads said act in defense to this action and the whole thereof.

The set-offs claimed by Connolly were: Treble the amount of the actual damages sustained and allowed by the act of Congress of June 2d 1890, c. 647, known as the Sherman anti-trust act, $56,970.44; actual damages sustained by reason of the violation by the plaintiff of the provisions of the Illinois statute of July 1st 1893, $17,323.48; and for money had and received by plaintiff of defendant contrary to law, $17,323.48.

The set-offs claimed by Dee were of like character but of larger amounts.

Both cases were, by agreement, submitted to the same jury and were treated as one consolidated case. At the trial the defendants respectively asked leave to amend their notices of special defenses, but leave was denied.

The Circuit Court disallowed both the first and second of the above special defenses, and in respect of the third its decision was that the Illinois Trust statute of 1893 was in violation of the Constitution of the United States. It consequently directed the jury to find a verdict for the plaintiff in each case; in the Connolly case, for the amount of the two notes sued on; in the Dee case, for the amount of the plaintiff's open account against him. Verdicts having been returned as directed, and a motion for new trial in one case, and motions for new trial and in arrest of judgment in the other, having been overruled, judgments were entered on the verdicts.

1. The defendant in error insists that these cases should have gone to the Circuit Court of Appeals, and has moved on that ground that the writ of error be dismissed. The defense in each case was based in part on the Illinois statute of 1893. The plaintiff insisted at the trial that that statute was in violation of the Constitution of the United States, and

its position was sustained by the Circuit Court. There have been suits in which the Circuit Court upon the claim of the defendant has applied the Constitution of the United States to the case before it and put the plaintiff out of court. Here, the plaintiff claimed that the State enactment upon which defendants relied was unconstitutional, and its position upon that point was sustained. In *Loeb* v. *Columbia Township Trustees*, 179 *U. S.* 472, 477, this court said: "The Circuit Court of Appeals Act does not declare that the final judgment of a Circuit Court in a case in which there was a claim of the repugnancy of a State statute to the Constitution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, if a claim is made in the Circuit Court, no matter by which party, that a State enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant. It was the purpose of Congress to give opportunity to an unsuccessful litigant to come to this court directly from the Circuit Court in every case in which a claim is made that a State statute is in contravention of the Constitution of the United States." Upon the authority of that case, the motion to dismiss is denied.

2. The defendant Connolly purchased Akron sewer pipe from the plaintiff and for the agreed price thereof gave the two promissory notes upon which he was sued. The defendant Dee also purchased Akron sewer pipe at an agreed price as shown by the account upon which he was sued. Each defendant disputed his liability to the plaintiff upon the ground that prior to the making of the contracts with the defendants respectively for pipe, the plaintiff corporation entered into a combination with certain firms, corporations and companies engaged in Ohio in the manufacture of Akron pipe; which combination, it is alleged, was in illegal restraint of trade and therefore forbidden by the principles of the common law as recognized and enforced both in Ohio and Illinois.

This defense cannot be maintained. Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies or either of them. It could pass a title by a sale to any one desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of Akron pipe.

In *Strait* v. *National Harrow Co.*, 51 *Fed. Rep.* 819, a suit in which the plaintiffs sought a permanent injunction restraining the defendant from instituting or prosecuting any action against the plaintiffs for the infringement of letters patent owned by the defendant covering certain improvements in spring-tooth harrows, or from instituting or prosecuting any such suits against any person using the spring-tooth harrows manufactured by the plaintiffs, the court said: "In substance, the complaint shows that the defendant has entered into a combination with various other manufacturers of spring-tooth harrows for the purpose of acquiring a monopoly in this country in the manufacture and sale of the same, and, as an incident thereto, has acquired all the rights of the other manufacturers for the exclusive sale and manufacture of such harrows under patents, or interests in patents, owned by them respectively. Such a combination may be an odious and a wicked one, but the proposition that the plaintiffs, while infringing the rights vested in the defendant under letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to the letters patent, is a novel one, and entirely unwarranted. The party having such a patent has a right to bring suit on it, not only against a manufacturer who infringes, but against dealers and users of the patented article, if he believes the patent is being infringed; and the motive which prompts him to sue is not open to judicial inquiry, because, having a legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for the attempt to assert his legal rights. 'The exercise of the legal right cannot be affected by the motive which controls it.' *Kiff* v. *Youmans*, 86 *N. Y.* 329."

In *National Distilling Co.* v. *Cream City Importing Co.*, 86 *Wis.* 352, 355, which was an action to recover the price of goods sold and delivered, one of the defenses was the plaintiff was a member of an illegal trust or combination to interfere with the freedom of trade and commerce. The Supreme Court of Wisconsin said: "The first defense does not deny any allegation of the complaint, but the substance of it is that the sale and delivery of the goods in question to the defendant was void as against public policy, because the vendor was at the time a member of an unlawful trust or combination, formed to unlawfully interfere with the freedom of trade and commerce and in restraint thereof and to accomplish the ends therein set forth. . . Conceding, for the purposes of this case, that the trust or combination in question may be illegal and its members may be restrained from carrying out the purposes for which it was created by a court of equity in a suit on behalf of the public, or may be subject to indictment and punishment, there is, nevertheless, no allegation showing or tending to show that the contract of sale between the plaintiff and defendant was tainted with any illegality,

or was contrary to public policy. The argument, if any the case admits of, is that, as the plaintiff was a member of the so-called 'trust,' or 'combination,' the defendant might voluntarily purchase the goods in question of it at any agreed price, and convert them to its own use, and be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is in no legal sense dependent upon, or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination, created with the intent and purposes set forth in the answer, will not disable or prevent it in law from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. It does not appear that it had stipulated to refrain from such transactions. A contrary doctrine would lead to most startling and dangerous consequences."

That case was cited with approval by the Circuit Court of Appeals for the Seventh Circuit in *Dennehy* v. *McNulta*, 86 *Fed. Rep.* 825, 827, 829. In that case the court said: "The mere fact that the corporation, as one of the contracting parties, may constitute an unjust monopoly, and that its general business is illegal—a status apparently held in *Distilling & Cattle Feeding Co.* v. *People*, 156 *Ill.* 448—cannot serve, *ipso facto*, to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any manner its independent contract obligations." Again: "In the case of an injurious combination of the nature asserted here, the remedy is by well recognized and direct proceedings; but one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination is illegal, or that its prices were unreasonable."

It is undoubtedly the general rule that a contract made in violation of a statute is void, and no recovery can be had upon it; as, in *Embrey* v. *Johnson*, 131 *U. S.* 336, 348. That was an action upon a promissory note given in execution of a contract for the purchase of "future delivery" cotton, neither the purchase or delivery of actual cotton being contemplated by the parties, but the settlement in respect to which was to be on the basis of the "difference" between the contract price and the market price of cotton futures, according to the fluctuations in the markets. The contract was held to be a wagering contract, and therefore illegal and void. As there could be no recovery upon the original agreement without disclosing the fact that it was illegal and one that could not, for that reason,

be enforced or made the basis of a judgment, it was held, that attention could not be withdrawn from the illegality of the contract by the device of taking notes for the amount claimed under that contract. So, in *Miller* v. *Ammon*, 145 *U. S.* 421, 427. That was an action to recover the value of 1125 gallons of wines sold in Chicago by one who had not obtained a license to sell liquors at all—an ordinance of that city expressly declaring that no person, firm, or corporation should sell or offer for sale "any spirituous or vinous liquors in quantities of one gallon or more at a time, within the city, without having first obtained a license therefor," under a penalty of not less than $50 or more than $200 for each offense. It was held that the action could not be maintained, because "an act done in disobedience to the law creates no right of action which a court of justice will enforce." In that case the sale from which it was attempted to imply the promise of the buyer to pay for what he received, was itself expressly forbidden by law under a penalty. The action there was upon the sale, and there was a direct connection between it and the purchase of the wines. So, again, in *McMullen* v. *Hoffman*, 174 *U. S.* 639, 654, after an extended review of the cases, American and English, the court said: "The authorities from the earliest time to the present unanimously held that no court will lend its assistance in any way toward carrying out the terms of an illegal contract."

In the present case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not for that reason forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principles of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would in itself be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and other corporations, firms or associations whereby an illegal combination was formed for the sale of sewer pipe.

We are of opinion that the first special defense, based alone upon the principles of the common law, was properly overruled.

3. The special defense based upon the act of Congress of July 2d 1890, c. 647, 26 *Stat.* 209, was also properly rejected.

That act declares illegal "every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations"—every person making any such contract or engaging in any such conspiracy being subject to a fine not exceeding $5,000, or to imprisonment not exceeding one year, or to both punishments in the discretion of the court. § 1. So, every person monoplizing or attempting to monopolize, or combining or conspiring with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, is liable by that act to the like penalties in the discretion of the court. § 2. The several Circuit Courts of the United States are invested with jurisdiction to prevent and restrain violations of its provisions. § 4. Any property owned under any contract or by any combination or pursuant to any conspiracy (and being the subject thereof), and being in the course of transportation from one State to another, or to a foreign country, is subject to be forfeited, seized and condemned. § 6. By another section it is declared: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefore in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." § 7.

Much of what has just been said in reference to the first special defense, based on the common law, is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the time in the course of transportation from one State to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants

by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid.

In the case of *The Charles E. Wisewall*, 74 *Fed. Rep.* 802, which was a libel *in rem* by certain tug owners against a steam dredge to recover the value of certain services rendered by the tug in towing the dredges, it was sought to avoid payment for the services thus rendered upon the ground that the tug owners were members of an association which was illegal and void under the Sherman act. The court, assuming that the agreement by which the tugs acted in unison was prohibited by that act, said: "He [the claimant] should not be permitted to repudiate his just debts to the individual tugs because their association was illegal. Having asked for their services and having accepted the benefit thereof, he should pay. . . An agreement by the tug Mayflower to tow the dredge Wisewall, for a reasonable sum, from Albany to Troy, is not void because the Mayflower is associated with other tugs to regulate the price of towing at Albany. Should the claimant purchase a pair of trousers at an Albany clothing shop, he would find it difficult to avoid paying their actual market price because the vendor and other tailors of that city had combined to keep up prices."

Nor can the defendants refuse to pay for what they bought upon the ground that the seventh section of the Sherman Act gives the right to any person "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" by the act, to sue and recover treble the damages sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that "unliquidated damages arising out of covenants, contracts or torts disconnected with plaintiff's claim can not be set off under the statute." *Robison* v. *Hibbs*, 48 *Ill.* 408, 409–410; *Hawks* v. *Sands*, 3 *Gilm.* 227, 232; *Hubbard* v. *Rogers*, 64 *Ill.* 434, 437; *Evans* v. *Hughey*, 76 *Ill.* 115, 120; *Clause* v. *Bullock Printing Press Co.*, 118 *Ill.* 612, 617; *Dushane* v. *Benedict*, 120 *U. S.* 630,

648. If the act of Congress expressly authorized one who purchased property from a combination organized in violation of its provisions to plead, in defense of a suit for the price, the illegal character of the combination, that would present an entirely different question. But the act contains no such provision.

4. We come now to the consideration of the defense based upon the Trust statute of Illinois of 1893.

As that statute is alleged to be repugnant to the Constitution of the United States, and that its full scope may be seen, it is here given in full:

"§ 1. That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of two or more of them for either, any or all of the following purposes: First—to create or carry out restrictions in trade. Second—to limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third—to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities. Fourth—to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established upon any article or commodity of merchandise, produce or manufacture intended for sale, use or consumption in this State; or to establish any pretended agency whereby the sale of any such article or commodity shall be covered up and made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor or manufacturer to control the wholesale or retail price of any such article or commodity after the title to such article or commodity shall have passed from such vendor or manufacturer. Fifth—to make or enter into, or examine or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or card or list price, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

"§ 2. That any corporation holding a charter under the laws of this State which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

"§ 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the Attorney General or prosecuting attorney, upon his own motion, to institute suit or *quo warranto* proceedings, at any county in this State in which such corporation exists, does business or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

"§ 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the Attorney General to enforce this provision by injunction or other proper proceedings, in any county in which such foreign corporation does business, in the name of the State on his relation.

"§ 5. Any violation of either or all of the provisions of section 1 of this act shall be and is hereby declared to be a conspiracy against trade, and a misdemeanor; and any person who may be or may become engaged in any such conspiracy or take part therein or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant or employee, or in any other capacity, knowingly carry out any of the stipulations, purposes prices, rates, orders thereunder, or in pursuance thereof, shall be punished by fine not less than two thousand dollars or more than five thousand dollars.

"§ 6. In any indictment or information for any offense named in this act, it is sufficient to state the purposes and effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how or where it was created.

"§ 7. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

"§ 8. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforcible either in law or equity.

"§ 9. The provisions of this act *shall not apply to agricultural products or live stock while in the hands of the producer or raiser.*

"§ 10. Any purchaser of any article or commodity, from any person, firm, corporation or association of persons, or of two or more of them, transacting business contrary to any provision of the preceding sections of this act, shall not be liable for the price or payment of such article or commodity and may plead this act as a defense to any suit for such price or payment." *Laws, Ill.* 1893, *p.* 188; *Hurd's Rev. Stat. Ill.* (1899), *p.* 618, *Title* "*Criminal Code.*"

Some reference was made to the act of the legislature of Illinois approved June 10th 1897, amending an act approved June 11th 1891, in force July

1st 1891, relating to the punishment of persons, partnerships or corporations forming pools, trusts and combines, and prescribing the mode of procedure and rules of evidence in such cases. The act of 1897 amended section one of the act of 1891 so as to read: "If any corporation organized under the laws of this or any other State or country for transacting or conducting any kind of business in this State, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of, or party to any pool, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, such corporation, partnership or individual or other association of persons shall be deemed and adjudicated guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act: provided, however, that in the mining, manufacture or production of articles of merchandise, the cost of which is mainly made up of wages, it shall not be unlawful for persons, firms or corporations doing business in this State to enter into joint arrangements of any sort, the principal object or effect of which is to maintain or increase wages." As this act of 1897 was passed after the date of the transactions here involved, it has nothing to do with the present case. Besides, the special defense was based on the act of 1893. The act of 1897 is referred to only as showing the exemption of another class from the operation of the general law relating to pools, trusts, combinations and confederations organized to regulate prices of articles, commodities and merchandise. *Laws, Ill.* 1897, *p.* 153; *Hurd's Revised Statutes of Illinois, pp.* 615, 639.

That the arrangement or combination made between the Union Sewer Pipe Company and other companies, corporations and firms, created such a trust as the Illinois statute forbids is manifest from the evidence in the record. It is equally clear that if the plaintiff was an Illinois corporation, its charter could be forfeited and an end put to its corporate existence by proceedings instituted by the Attorney General of the State. §§ 1, 2 and 3. It is also clear that, if the statute is not altogether invalid the defendants could plead non-liability for the pipe purchased by them upon the ground that the plaintiff was, under the statute of Illinois, an illegal combination and the contracts which it made with the defendants were void. §§ 8, 10. The statute expressly authorizes such a defense. In that particular, the defense based upon the statute of Illinois differs from the other special defenses.

The vital question, however, is whether the statute of Illinois of 1893 is not inconsistent with the Constitution of the United States, by reason of

the fact that by the ninth section it declares that "the provisions of this act shall not apply to agricultural products or live stock while in the hands of producer or raiser." The Circuit Court held this section to be repugnant to the Fourteenth Amendment of the Constitution of the United States, and to be so connected and interwoven with other sections that its invalidity affected the entire act.

Looking specially at its provisions, it will be seen that, so far as the statute is concerned, two or more agriculturalists or two or more live stock raisers may, in respect of their products or live stock in hand, combine their capital, skill or acts for the purpose of creating or carrying out restrictions in the sale of such products or live stock; or limiting, increasing or reducing their price; or preventing competition in their sale or purchase; or fixing a standard or figure whereby the price thereof to the public may be controlled; or making contracts whereby they would become bound not to sell or dispose of such agricultural products or live stock below a common standard figure or card or list price; or establishing the price of such products or stock in hand, so as to preclude free and unrestricted competition among themselves or others; or by agreeing to pool, combine or unite any interest they may have in connection with the sale or transportation of their products or live stock that the price might be affected. All this, so far as the statute is concerned, may be done by agriculturalists or live stock raisers in Illinois without subjecting them to the fine imposed by the statute. But exactly the same things, if done by two or more persons, firms, corporations or associations of persons, who shall have combined their capital, skill or acts, in respect of their property, merchandise or commodities held for sale or exchange, is made by the statute a public offense, and every principal, manager, director, agent servant or employee knowingly carrying out the purposes, stipulations and orders of such combination is punishable by a fine of not less than two thousand nor more than five thousand dollars. Is not this such discrimination against those engaged in business (other than the sale of agricultural products and live stock in the hands of producers and raisers) as is forbidden by that clause of the Fourteenth Amendment which declares that "no State shall . . deny to any person within its jurisdiction the equal protection of the laws?"

By section 26 of a statute of Illinois it is provided: "Foreign corporations, and the officers and agents thereof, doing business in this State shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon associations of like character organized under the general laws of this State, and shall have no other or greater powers." 1 *Starr & Curtis*, 619. The contracts upon which these suits are based were made in Illinois. The purpose of the above statute was "to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic cor-

porations of like character and bring them all under the influence of the same law." *Stevens* v. *Pratt*, 102 *Ill.* 206; *Farmers' Loan and Trust Co.* v. *Lake St. Elevated R. R. Co.*, 173 *Ill.* 439. These matters are called to our attention as showing—as undoubtedly it does—that the Union Sewer Pipe Company, while doing business in Illinois, was subject to the statute of Illinois concerning trusts or combinations, and which, in terms, applies to both domestic and foreign corporations. But the question remains to be decided whether the statute is repugnant to the Constitution of the United States. If it be, then it is not law and cannot be applied for the purpose of defeating the plaintiff's claims in these actions.

The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this court, were not included in the grants of power to the General Government, and therefore were reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a State enactment, whatever may be the source from which the power to pass such enactment may have been derived. "The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law." The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons* v. *Ogden*, 9 *Wheat.* 1, 210; *Sinnot* v. *Davenport*, 22 *How.* 227, 243; *M. K. & T. Ry. Co.* v. *Haber*, 169 *U. S.* 613, 626.

What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the States will show. It is sometimes difficult to show that a State enactment, having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guarantee of the equal protection of the laws means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances." *Missouri* v. *Lewis*, 101 *U. S.* 22, 31. We have also said: "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property, without due process of law,

nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." *Barbier* v. *Connolly*, 113 *U. S.* 27, 31. This language was cited with approval in *Yick Wo* v. *Hopkins*, 118 *U. S.* 356, 369, in which it was also said that "the equal protection of the laws is a pledge of the protection of equal laws." In *Hayes* v. *Missouri*, 120 *U. S.* 68, 71, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, "shall be treated alike, under like circumstances and considerations, both in the privileges conferred, and in the limitations imposed." "Due process of law and the equal protection of the laws," this court has said, "are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." *Duncan* v. *Missouri*, 152 *U. S.* 377, 382. Many other cases in this court are to the like effect.

These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute *all* except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a State, and agriculturalists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe.

The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects.

For this court has held that classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." *Gulf, Colorado and Santa Fé Railway* v. *Ellis*, 165 *U. S.* 150, 155, 159, 160, 165. These principles were recognized and applied in *Cotting* v. *Kansas City Stock Yards Co.*, 183 *U. S.* 879, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the State, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws.

Attention has been called to the cases of *Magoun* v. *Illinois Trust and Savings Bank*, 170 *U. S.* 283, and *American Sugar Refining Co.* v. *Louisiana*, 179 *U. S.* 89; and it is supposed that the grounds upon which the decision of the present case is placed are inconsistent with the principles announced in those cases. We do not think so.

In *Magoun* v. *Illinois Trust and Savings Bank* we held that the progressive inheritance tax law of Illinois of June 15th 1895 was not in conflict with the Constitution of the United States by reason of the fact that the amount of the tax was determinable by valuation so that every person and corporation should pay in proportion to the value of his, her or its property inherited. The classification made by the statute was held not to be arbitrary by reason of the fact that inheritances were classified according to amount, and each class taxed at a different rate; for it was based upon principles of equality between the members of each distinct class. Such classification was held not to be inconsistent with the Fourteenth Amendment.

In *American Sugar Refining Co.* v. *Louisiana*, we held that a statute of Louisiana exempting from its operation planters and farmers grinding and refining their own sugar and molasses, but which imposed a license tax upon persons and corporations carrying on the business of refining sugar

and molasses, did not deny the equal protection of the laws to such persons and corporations as were thus taxed. It was as if the statute had imposed a tax upon the *business* of refining sugar and molasses, and had declared, as reasonably it might have done, that those who only refined their own sugar and molasses should not be regarded as belonging to that class. We said in that case: "The power of taxation under this provision was fully considered in *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 *U. S.* 232, in which it was said not to have been intended to prevent a State from changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only and not securities; may allow or not allow deductions for indebtedness. 'All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature or the people of the State in framing their constitution.'" Again: "The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."

The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the State, and involved considerations that could not, in the nature of things, apply to a State enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property or all callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the State. A State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct

of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates.

We must not be understood by what has been said as conceding that the question of a denial of the equal protection of the laws can never arise under the taxing statutes of a State. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land. We only need to say in this connection that the constitutional validity of the statute of Illinois now before us is not necessarily to be determined by the same principles that apply to taxing laws.

Other cases have been cited, but they are equally inapplicable in the present discussion, and only serve to show the extent to which the police powers of the States may be exerted without infringing the Federal Constitution.

Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation

be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.

We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary.

We therefore hold that the act of 1893 is repugnant to the Constitution of the United States, unless its ninth section can be eliminated, leaving the rest of the act in operation.

The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. The first section of the act here in question embraces by its terms *all* persons, firms, corporations or associations of persons who combine their capital skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or live stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and live stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section.

Whether it is also within the prohibition against the deprivation of property without due process of law, is a question which it is unnecessary to consider at this time.

Perceiving no error in the record, the judgment in each case must be affirmed.

*It is so ordered.*

Mr. Justice GRAY did not participate in the decision of this case.

True copy.

Test:

*Clerk Supreme Court, U. S.*

# Supreme Court of the United States.

No. 46.—October Term, 1901.

Thomas Connolly and William E. Dee, Plaintiffs in Error, vs. The Union Sewer Pipe Company. } In error to the Circuit Court of the United States for the Northern District of Illinois.

[March 10, 1902.]

Mr. Justice McKenna dissenting.

The trust statute of Illinois of 1893 is directed against combinations in trade made to affect prices of commodities. The court holds that the statute is repugnant to the Constitution of the United States because of the ninth section, which excludes from the operation of the statute "agricultural products or live stock while in the hands of the producer or raiser." In other words, and to present the discriminations of the statute in its application to persons, it punishes as a criminal conspiracy the acts enumerated in section one, except when they are done by producers and raisers of agricultural products and live stock in respect thereto. The statute also takes away a right of action for the price of the commodities sold. One of the defenses of the plaintiffs in error was based on that provision.

The view of the court is that the legislation is purely discriminative and is not justified by any legal principle of classification. To sustain the view the rule expressed in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, (165 U. S. 150,) is quoted. It was there said: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." Undoubtedly. Without the observance of that principle, there can be no classification at all in any proper sense. There will be arbitrary grouping—not association of persons or things on acount of common properties or characters or relations. But differences are recognized in classification as well as resemblances, and this court has found it necessary to so state. In *Atchison, Topeka & Santa Fe Ry.* v. *Matthews*, (174 U. S. 96,) we said: "Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

It seems like a contradiction to say that a law having inequality of operation may yet give equality of protection. Viewed rightly, however, the contradiction disappears; indeed, need not even be expressed. There are very few exertions of government which can be made applicable to all persons as such. Government is not a simple thing. It encounters and must deal with the problems which come from persons in an infinite variety of relations. Classification is the recognition of those relations, and in making it a legislature must be allowed a wide latitude of discretion and judgment. This has been decided many times against contentions based on a variety of facts. I will content myself by citing the later cases and commenting upon them very briefly. The cases are *Magoun* v. *Illinois*, (170 U. S. 283;) *Clark* v. *Kansas City*, (176 U. S. 114;) *Gundling* v. *Chicago*, (177 U. S. 183;) *Petit* v. *Minnesota*, (Id. 164;) *Williams* v. *Fears*, (179 U. S. 270;) *American Sugar Refining Company* v. *Louisiana*, (179 U. S. 89.)

In these cases and the cases cited in them classifications were sustained which depended upon differences in the amounts of legacies; on differences between corporations; on differences between land dependent on its use for agriculture and other purposes in regard to the power of a city to annex it; on differences between fire insurance and other insurance; on the right of a legislature to declare as a matter of law that the work of a barber was not a work of necessity, while as to all other kinds of labor the fact was to be determined by a jury; on the difference between hiring persons to labor in the State and hiring persons to labor out of the State; on differences between sugar refiners based entirely and only on the fact of the production or purchase of the sugar refined.

In *American Sugar Refining Co.* v. *Louisiana*, a license tax was imposed on those engaged in carrying on the business of refining sugar and molasses. It was provided, however, that the law should not apply to "planters and farmers grinding and refining their own sugar."

Wherein did the Louisiana statute, which was held constitutional, differ from the Illinois statute, which is held to be unconstitutional? In the former case the distinction (in the opinion in the case it is called "discrimination") was between manufactures of sugar and growers of it. In the case at bar the distinction is between traders in products and growers of them. Is not a parallel obvious? Can the cases be distinguished because in one a tax was imposed and in the other conduct is regulated or penalized? Indeed, is not the distinction verbal, each being means to an end? Besides, what justification for the distinction is there under the Constitution? None, I submit, can be found in the words of that instrument. Any State legislation which denies the equal protection of the laws is prohibited. The prohibition is independent of form or means. It would be strange, indeed, if the power of a State is limited and confined by the Constitution of the United States, when the State attempts by law to regulate conduct, and is unbounded in

its discretion when it imposes taxes; that in one case it may see a difference between manufacturers and planters, and in the other case may not see a difference between traders in commodities acquired for the purposes of sale and such property when held by farmers by whose labor they were produced.

The reasoning of the cases is as strong and demonstrative as their instances. We have declared that we could not investigate or condemn the impolicy of a State law, and that this court is not a refuge from the mere injustice and oppression of State legislation. Many of the exercises of government, it has been pointed out, were addressed to persons, not absolutely or abstractly, but according to their relations, and that classification, based on those relations, need not be constituted by an exact or scientific exclusion or inclusion of persons or things. Therefore, it has been repeatedly declared that classification is justified, if it is not palpably arbitrary.

The cases afford not only affirmative examples but also by a negative deduction illustrate what is legal classification. Mr. Justice Bradley said in *Bell's Gap Railroad* v. *Pennsylvania*, (134 U. S. 232): "Clear and hostile demonstrations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition." That is, the prohibition upon the States to deny to any citizen the equal protection of the laws. The thought of Mr. Justice Bradley was developed and illustrated by Mr. Justice Brown, speaking for this court in *American Sugar Refining Co.* v. *Louisiana*, and tests of the unconstitutionality of the discriminations of a State law were expressed, which were as ready as they were significant. Speaking of the Louisiana act, which discriminated between refiners of sugar, Mr. Justice Brown said: "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely *arbitrary, oppressive or capricious* (the italics are mine), and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes."

Of course, the enumeration of some tests does not exclude others, but why the enumeration of the special kind? Did not the case require it? What ingenuity can find a difference in the act and process of sugar refining when done by a purchaser of raw sugar and a raiser (planter) of it; what difference in the product after it shall be refined, or in any element, thing or circumstance, which can affect its use or sale. The whole and only distinction in the classes which the statute made was between the

grower of sugar and the buyer of it—the exact and only distinction of the Illinois law now held to be void, and yet the Louisiana law was sustained as constitutional.

I have already adverted to the distinction which may be claimed to exist between taxing laws and regulating laws, but a few words more may be justified. The opinion of the court makes a great deal of the penal provisions of the trust law, and its discriminations are displayed and intensified more by the recitation and effect of those provisions than by the provision upon which the defense of plaintiffs in error was based, that is, the provision (sec. 10) which precludes recovery of the price of "any article or commodity sold" by an offender against the statute.

The penal provisions of the statute are not before us for judgment. If they were, and the unconstitutionality of the statute could be attributed to them, they might be construed as separable and be discarded. But, not insisting on that, and considering the comments on those provisions to be more than incidental illustration of the character of the statute, it is very clear to me that they do not in any way affect the power of the State. In other words, the power of the State cannot be impugned or affected by the sanctions which the State may impose to secure obedience to its commands or prohibitions. It may be through a tax or it may be through penalties, and the question will always be, is the thing which is directed or forbidden within the power of the State? And when a statute is assailed as denying the equal protection of the laws its equal operation is only involved.

The principle of classification, therefore, is not different in tax laws than in other laws. That principle, as I have said, necessarily implies discrimination between the persons composing the class and other persons. The equality prescribed by the Constitution is fulfilled if equality be observed between the members of the class. It is violated if such equality be not observed, and the latter was the case in *Cotting* v. *Kansas City Stock Yards Co.*, (183 U. S. 819.) That case, therefore, does not sustain the ruling now made.

Any further remarks may be only repetition, but the application of the cases to the statute now before us should be pointed out.

The equality of operation which the Constitution requires in State legislation cannot be construed, as we have seen, as demanding an absolute universality of operation, having no regard to the different capabilities, conditions and relations of men. Classification, therefore, is necessary, but what are its limits? They are not easily defined, but the purview of the legislation should be regarded. A line must not be drawn which includes arbitrarily some persons who do and some persons who do not stand in the same relation to the purpose of the legislation. But a wide latitude of selection must be left to the legislature. It is only a palpable abuse of the

power of selection which can be judicially reviewed, and the right of review is so delicate that even in its best exercises it may lead to challenge. At times, indeed, it must be exercised, but should always be exercised in view of the function and necessarily large powers of a legislature.

What was the purpose of the Illinois statute, and what were the relations of its classes to that purpose? The statute was the expression of the purpose of the State to suppress combinations to control the prices of commodities, not, however, in the hands of the producers, but in the hands of traders, persons or corporations. Shall we say that such suppression must be universal or not at all? How can we? What knowledge have we of the condition in Illinois which invoked the legislation, or in what form and extent the evil of combinations to control prices appeared in that State? Indeed, whether such combinations are evils or blessings, or to what extent either, is not a judicial inquiry. If we can assume them to be evil because the statute does so, can we go beyond the statute and determine for ourselves the local conditions and condemn the legislation dependent thereon? But are there not, between the classes which the statute makes, distinctions which the legislature had a right to consider? Of whom are the classes composed? The excluded class is composed of farmers and stockraisers while holding the products or live stock produced or raised by them. The included class is composed of merchants, traders, manufacturers, all engaged in commercial transactions. That is, one class is composed of persons who are scattered on farms; the other class is composed of persons congregated in cities and towns, not only of natural persons but of corporate organizations. In the difference of these situations, and in other differences which will occur to any reflection, might not the legislature see difference in opportunities and powers between the classes in regard to the prohibited acts? That differences exist cannot be denied. To describe and contrast them might be invidious. To consider their effect would take us from legal problems to economic ones, and this demonstrates to my mind how essentially any judgment or action, based upon those differences, is legislative and cannot be reviewed by the judiciary.

I am, therefore, constrained to dissent from the judgment of the court.

True copy.

Test:

*Clerk Supreme Court, U. S.*